

UNIVERSITY OF CAPE TOWN



BALANCING CHILD PARTICIPATION RIGHTS, PARENTAL RESPONSIBILITY AND STATE INTERVENTION IN MEDICAL AND REPRODUCTIVE DECISION- MAKING UNDER SOUTH AFRICAN LAW

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Thesis Presented for the Degree of DOCTOR OF PHILOSOPHY in the Department of Public
Law, Faculty of Law, UNIVERSITY OF CAPE TOWN

September 2014

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UNIVERSITY OF CAPE TOWN

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DECLARATION

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ABSTRACT

Throughout history, the boundaries between children's rights, parental responsibility and state intervention have been regularly redrawn. At the heart of this process is the need to recognise the separate personhood of the child and the important role played by parental guidance in the proper upbringing of children. While participation rights spring from the child's autonomy-related claims, parental guidance and state intervention arise from the child's need for protection, at least until the child either reaches the age of consent or attains majority status. Thus, children are now seen as holders of autonomy rights who should nonetheless be protected, by parents and the state, from personal decisions that threaten other important interests.

At the international level, the separate personhood of the child has been legally reinforced by the adoption of the Convention on the Rights of the Child. This instrument entrenches non-discrimination, child participation rights, the best interests of the child and the right to life, survival and development as general principles of children's rights. These principles have been largely domesticated in South African law and play an important role in determining how much autonomy and protection should be given to children. This study relies upon primary and secondary legal materials to explain whether international and domestic law strike an appropriate balance between children's autonomy, parental responsibility and state intervention in decision-making.

South African law confers on adolescents the autonomy to make independent medical decisions provided they have sufficient maturity to do so. In this respect, the Children's Act uses the evolving capacities of the child to determine the levels of autonomy and protection to be enjoyed by the child. However, the child may not exercise autonomy in a manner that is inconsistent with their best interests (and right to life) and the Children's Act properly allows the state to intervene when the child unreasonably refuses important medical interventions. This study demonstrates that South African law permits adolescents to use contraceptives and to terminate their pregnancies without parental consent. This liberal approach is motivated by the need to protect children from unsafe sex, sexually transmitted diseases, unwanted pregnancies, unsafe abortions and death. However, there is need to stipulate an age of consent and to regulate cases where an adolescent refuses to terminate life-threatening pregnancies.

DEDICATION

This study is dedicated to my children; Progress Fatima Moyo, Clever Courage Moyo and Everdene Tadiwanashe Moyo, who endured trials and tribulations during the last phases of the research and writing process; to my friend for the past 17 years, Stephen Mpofu, who died after a short illness in March 2014; to my friend's child, Praise Mpofu, whom I owe the kindness, support and love shown by her father to my own children; to my young brother Admonish Moyo, who died in a car accident in the morning of 17 June 2014; to his child, Prudence Moyo, who now stands as a symbol of hope in the midst of adversity; and to all children who suffer abuse, exploitation and degradation at the hands of parents, relatives, governments, militants, terrorist groups and other menaces of our time.

ACKNOWLEDGEMENTS

I am indebted to a number of persons who created an environment which made the completion of this study possible. First and foremost, I wish to express my gratitude to my supervisor, Professor Danwood Chirwa, for his endurance in guiding me towards understanding what is required by an assignment of this magnitude. Thank you for allowing me to draw from the knowledge that you have acquired over many years of unparalleled scholarship. You have been a true mentor in more than one way and have shown me the value of outstanding supervision. This thesis is in large measure a product of your patience, measured analysis, honesty and professional integrity. Your expertise in human rights law, particularly the law on the international rights of the child, gave me a profound understanding of children's rights and the nature of duties they generate on the part of parents and the state.

My thanks also go to my friend, Valentine Mutatu, who has been there for me during the past two years. The support that you gave towards the completion of this study was tremendous and I will forever remain indebted. Whoever invented the term 'true friend' must have seen someone like you. Patience Madamombe did a great deal of editorial work on this study and helped me to enhance the quality of the final product. Thank you for the spirit of sacrifice and service you showed towards me. Then, there are friends that are available to you when you really need someone to talk to or when you wish to share some sensitive stories about life and humanity's struggle to make sense of it. This is the place where Suffinah and my cousin, Idzai Matutu, fit in in this complex, but important web of social relations. The experiences we had will always be missed.

My family, particularly my children, provided great levels of inspiration in ways that they cannot even imagine. This thesis bears symbolic value in that it is meant to show my children that when commitment is paired with passion and hard work, it is possible for anyone to achieve their goals in life. I wish also to thank my other cousin Jemitias Chivavava and fellow compatriots Simbarashe Madzana, Phil Arito and Armstrong Chiwade, for providing company during this 'long walk to [academic] freedom'. The moral support you gave to me was immense and immeasurable. This is the product of those long nights we spent working together and encouraging each other for a worthy cause. We shared numerous stories which inspired me to soldier on during times of loss and adversity, and to focus on the ultimate price

no matter how long and dark the tunnels we were in seemed to be. We pressed towards the mark. Arito deserves special thanks for helping me with the formatting of this thesis and I wish to thank him for that. Ken Mutuma, a runner who crossed the finishing line a year before me, helped a lot with discussions on how to make my case better. Thank you for making yourself available for those long discussions time and again. It helped.

The University of Cape Town, particularly the Faculty of Law, was at the heart of the research and writing process. This institution is led by men and women with outstanding levels of humility, creativity, professional integrity and a sense of responsibility towards the student body. The financial assistance that I got from the Postgraduate Funding Office and the Faculty of Law went a long way in creating an environment conducive to postgraduate research. Without those scholarships, conference travel grants and emergency bursaries, I would not have been able to sustain the levels of concentration that are needed for doctoral research. In addition, the support I received from the Faculty of Law library staff was outstanding and gave me research skills that will remain useful way after my entry into the labour market.

Finally, God the Almighty has been very forgiving and patient with me. I have seen a lot in my short life to even begin questioning His existence, identity and mission. I don't remember any example of a prayer I made which was not subsequently answered. Thank you for being my father, comforter, counsellor and friend. My life in the past two years provides further evidence to the Psalmist's declaration that '[t]he Lord is my shepherd, I shall not want'. There are times when I 'sat by the river Jordan', weeping, crushed and entirely devastated, but God extended his right hand, lifted me up, signed with me a new covenant and gave me one more reason to believe that it was possible to complete the task that was at hand.

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INTERNATIONAL AND DOMESTIC LEGAL INSTRUMENTS

International Treaties and Declarations

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol on San Salvador).

African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990) entered into force 29 November 1999.

Declaration of the Rights of the Child, G.A. res 1386 (XIV), 14. U.N GAOR Supp (NO. 16), at 19, U.N. Doc. A/4354 (1959).

Declaration on the Rights and Welfare of the African Child 1979 OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov 29, 1999.

Geneva Declaration of the Rights of the Child of 1924, *adopted* Sept. 26, 1924, League of Nations O.J. Spec. Supp. 21, at 43 (1924).

The International Covenant on Civil and Political Rights G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976

The International Covenant of Economic, Social and Cultural Rights G.A. res. 2200A (XXI), 21 U.N.GAOR Supp.(No.16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

United Nations Convention on the Rights of the Child, GA Res 44/25, annex, 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49 (1989) entered into force 2 September 1990.

Universal Declaration of Human Rights G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

Vienna Convention on the Law of Treaties 1155 U.N.T.S. 331, 8 I.L.M. 679, adopted 22 May 1969, *entered into force* Jan. 27, 1980.

Concluding Observations of the Committee on the Rights of the Child

Andorra CRC/C/15/Add.176 (2002).

Argentina CRC/C/15/Add.187 (2002).

Bangladesh CRC/C/15/Add.221 (2003).

Belgium CRC/C/15/Add.178 (2002).

Belize CRC/C/15/Add.99 (1999).

Benin CRC/C/15/Add.106 (1999).

Bhutan CRC/C/15/Add.157 (2001).

Bolivia CRC/C/15/Add.1, (1993).

Brunei Darussalam CRC/C/15/Add.219 (2003).

Burkina Faso CRC/C/15/Add.19 (1994).

Burundi CRC/C/15/Add.133 (2000).

Cambodia CRC/C/15/Add.128 (2000).

Canada CRC/C/15/Add.215 (2003).

Cape Verde CRC/C/15/Add.168 (2001).

Central African Republic CRC/C/15/Add.138 (2000).

Chile CRC/C/15/Add.173 (2002)

China CRC/C/15/Add.56 (1996).

Colombia CRC/C/15/Add.137 (2000).

Costa Rica CRC/C/15/Add.11 (1993).

Egypt CRC/C/15/Add.5 (1993).

India CRC/C/15/Add.115 (2000).

Iraq CRC/C/15/Add.94 (1998).

Latvia CRC/C/15/Add.142 (2001).

Libyan Arab Jamahiriya CRC/C/15/Add.15 (2003).

Nigeria CRC/C/15/Add.61 (1996).

Spain CRC/C/15/Add.185 (2002).

Sweden CRC/C/15/Add.2 (1993).

Togo CRC/C/15/Add.83 (1997).

United Kingdom CRC/C/15/Add.34 (1995).

General Comments of the Committee on the Rights of the Child

General Comment No. 1 ‘Article 29(1): The Aims of Education’ CRC/GC/2001/1 (2001).

General Comment No. 3 ‘HIV/AIDS and the rights of the child’ CRC/GC/2003/3 (2003).

General Comment No. 4 ‘Adolescent health and development in the context of the Convention on the Rights of the Child’ CRC/GC/2003/4 (2003).

General Comment No. 5 ‘General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)’ CRC/GC/2003/5 (2003).

General Comment No. 6 ‘Treatment of unaccompanied and separated children outside their country of origin’ CRC/GC/2005/6 (2005).

General Comment No. 7 ‘Implementing child rights in early childhood’ CRC/C/GC/7 (2005).

General Comment No. 8 ‘The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)’, CRC/C/GC/8 (2006).

General Comment No. 9 ‘The rights of children with disabilities’ CRC/C/GC/9 (2006).

General Comment No. 10 ‘Children’s rights in juvenile justice’ CRC/C/GC/10 (2007).

General Comment No. 11 ‘Indigenous children and their rights under the Convention’ CRC/C/GC/11 (2009).

General Comment No. 12 ‘The right of the child to be heard’ CRC/C/GC/12 (2009).

General Comment No. 14 ‘The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)’ CRC/C/GC/14 (2013).

General Comment No. 15 ‘The right of the child to the enjoyment of the highest attainable standard of health (art. 24)’ (2013).

General Comment No. 16 ‘State obligations regarding the impact of the business sector on children’s rights’ CRC/C/GC/16 (2013).

General Comments of the Human Rights Committee

General Comment 3 ‘Article 2: Implementation at the national level’ (1981).

General Comment No. 6, HRI/GEN/1/Rev.8 (1982).

General Comment No. 14, HRI/GEN/1/Rev.8 (1984).

General Comment No. 17: Article 24 (Rights of the Child) (1989).

General Comment 18: Non-discrimination: 10/11/89.

Other documents compiled by several structures of the United Nations

Annan K *We the Children: Report to the Children’s Summit: Meeting the promises of the World Summit for Children* (2002) United Nations.

Centre for Human Rights, *The Rights of the Child* (Fact Sheet No. 10) (1990) United Nations, Geneva.

Committee on the Rights of the Child, Day of General Discussion, ‘The role of the family in the promotion of the rights of the child’ in *Report on the fifth session* CRC/C/24, Annex V, (1994).

Committee on the Rights of the Child, ‘Initial Reports of States Parties Due in 1992: Sweden’ CRC/C//3/Add.1 (1992).

United Nations, *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance* U.N. Doc. A/CONF.189/12 (2001).

United Nations Commission on Human Rights, *Report of the Working Group on a Draft Convention on the Rights of the Child* E/CN.4/L.1575 (1981).

United Nations Commission on Human Rights, *Report of the Working Group on a Draft Convention on the Rights of the Child* E/CN.4/1982/Add. 1 (1982).

United Nations Commission on Human Rights, *Report of the Working Group on a Draft Convention on the Rights of the Child* UN Doc. E/CN.4/1983/62, (1983).

United Nations Commission on Human Rights, *Report of the Working Group on a Draft Convention on the Rights of the Child* E/CN.4/1984/71 (1984).

United Nations Commission on Human Rights, *Report of the Working Group on a Draft Convention on the Rights of the Child* E/CN.4/1986/39 (1986).

United Nations Commission on Human Rights, *Report of the Working Group on a Draft Convention on the Rights of the Child* E/CN.4/1987/25 (1987).

United Nations Commission on Human Rights, *Report of the Working Group to the Commission on Human Rights* E/CN.4/1988/28 (1988).

United Nations Commission on Human Rights, *Report of the Working Group on a Draft Convention on the Rights of the Child* E/CN.4/1989/48 (1989).

United Nations Commission on Human Rights, *Report of the Working Group on a Draft Convention of the Rights of the Child* E/CN.4/L.1468 (1979).

United Nations Commission on Human Rights, *Report of the Working Group on Traditional Practices Affecting the Health of Women and Children* E/CN.4/1986/42 (1986).

United Nations Commission on Human Rights, *Technical Review of the Text of the Draft Convention on the Rights of the Child*, E/CN.4/1989/WG.1/CRP.1, (1989).

United Nations Department of Public Information, International Conference on Population and Development (ICPD), *Summary of Programme of Action*, DPI/1618/POP, Conference held in Cairo on 5-13 September 1994.

United Nations Economic and Social Council Official Records ‘Summary Record of the 61st Meeting, 49th Session’ E/CN.4/1993/SR.61, (1993).

United Nations General Assembly (UN GA) C.3 (Third Committee) ‘Summary record of the 37th meeting’ A/C.3/37/SR.37 (1989).

United Nations General Assembly (UN GA) C.3 (Third Committee) ‘Summary record of the 38th meeting’ A/C.3/44/SR.38 (1989).

United Nations General Assembly (UN GA) C.3 (Third Committee) ‘Summary record of the 44th meeting’ A/C.3/44/SR.44 (1989).

United Nations Population Fund, *Report of the International Conference on Population and Development, Cairo, 5-13 September 1994*, A/CONF.171/13/Rev.1, (1995).

United Nations Legislative Series (UN LS) ‘Multilateral Treaties Deposited with the Secretary General: Status as at December 31, 1992’ (1993).

United Nations Population Fund, *Maternal mortality update 2004 – delivering into good hands* (New York: United Nations Population Fund and University of Aberdeen, 2004).

United Nations Rules for the Protection of Juveniles Deprived of their Liberty, General Assembly Resolution 45/113 (1990).

Vukovich G *Key actions for the further implementation of the Programme of Action of the International Conference on Population and Development* Report of the Ad Hoc Committee of the Whole of the Twenty-First Special Session of the General Assembly, A/S-21/5/Add.1 (1999).

Domestic legal instruments

Children's Act 38 of 2005.

Choice on Termination of Pregnancy Act 92 of 1996.

Constitution of the Republic of South Africa, 1996.

National Health Act 61 of 2003.

Documents compiled by the South African Law Reform Commission

Report on the Investigation into the Advancement of the Age of Majority (Project 43, 1985).

Report on Access to Minor Children by Interested Persons (Project 100, 1996).

Report on the Review of the Child Care Act (Project 110, 2002).

Review of the Child Care Act, Discussion Paper 103 (Project 110, 2001).

Report on Euthanasia and the Artificial Preservation of Life (Project 86, 1998).

TABLE OF INTERNATIONAL, FOREIGN AND DOMESTIC CASES

International and regional cases

Llantoy Huaman v Peru 13 IHRR 355 (2006).

Osman v United Kingdom 29 EHHR 245 (ECHR).

Roach & Pinkerton v. United States, Case 9.647, Inter-Am. C.H.R., Report No. 3/87, OEA/Ser.L/V/II.71, doc. 9 rev.1 ¶ 56 (1987).

Foreign cases

United Kingdom

An NHS Trust v MB [2006] 2 FCR 319.

Appleton v Garrett (1995) 34 BMLR 23.

Chester v Afshar [2004] UKHL 41.

Gillick v West Norfolk and Wisbech AHA and Department of Health and Social Security [1986] 1 AC 112.

R v Portsmouth Hospitals NHS Trust ex parte Glass [1999] 2 FLR 905.

R (Burke) v General Medical Council (2004) 2 FLR 1121.

Re B (A Minor)(Wardship: Medical Treatment) [1981] 1 WLR 1421.

Re B (A Minor)(Wardship: Sterilisation) [1988] AC 199.

Re C (HIV Test) [1999] 2 FLR 1004.

Re D (A Minor) (Wardship: Sterilisation) [1976] Fam 185.

Re E: (A Minor)(Wardship: Medical Treatment) [1993] 1 FLR 386.

Re G [1997] 1 All ER 906 (CA).

Re J (Wardship: Medical treatment) [1991] 2 WLR 140.

Re L [1999] 2 FLR 376.

Re M (Child: Refusal of medical treatment) [1999] 2 FCR 577.

Re O (A Minor) (Medical Treatment) [1993] 2 FLR 149.

Re P (A Minor)(Medical Treatment: Best interests) 2 All ER 1117.

Re R (A minor)(Wardship: Medical treatment) [1992] Fam 11 at 26A, CA.

Re S (A Minor)(Medical Treatment) [1993] 1 FLR 376 .

Re T (Wardship: Medical Treatment) [1997] 1 WLR 242.

Re W (A Minor) (Medical Treatment) [1992] 4 All ER 627.

Sidaway v Bethlem RHG [1985] 1 All ER 643.

United States of America

Brownfield v Daniel Daniel Freeman Marina Hospital 208 Cal App 3d 405, 412-414 (1989).

Canterbury v Spencer 464 F 2d 772 (DC Cir 1972).

Carey v Population Servs Intl 431 US 678, 693 (1977).

Casey v Planned Parenthood of South Eastern Pennsylvania (1992) 120 L ed 2d 674.

Eisenstadt v Baird 405 US 438, 453 (1972).

In re Osborne, 294 A.2d 373 (D.C. Ct. App. 1972) (84-year-old Jehovah's Witness).

In re Pogue, Wash. Post, Nov. 14, 1974, § C, at 1, col I (No. M-18-74, Super. Ct., D.C., Nov. 11, 1974).

Planned Parenthood of Central Missouri v Danforth 428 US 52 (1976).

Prince v Massachusetts 1944. 321 U.S. 158 (1944).

Re E.G., 549 NE2d 322 (Ill 1989).

Roe v Wade (1972) 35 Led 2ed 147.

Roper v. Simmons, 543 U.S. 551 (2005).

Schloendorff v Society of the New York Hosp 211 NY 125, 129-30 105 NE 92, 93 (1914).

Thornburg v American College of Obstetricians and Gynaecologists (1986) 476 US 747.

Washington v Glucksberg 521 US 702 (1997) 717.

Domestic cases

Abrahams v Abrahams 1981 (3) SA 593 (B).

AD v DW (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party) 2008 (3) SA 183 (CC).

Administrator, Natal v Edouard 1990 (3) SA 581 (AD).

Allsop v McCann 2001 (2) SA 707 (C).

Antonie v Governing Body, Settlers High School and Others 2002 (4) SA 738 (C).
50 (T).

Applicant v Administrator, Transvaal and Others 1993 (4) SA 733 (T).

B v M [2006] 9 BCLR 1034 (W).

B v P 1991 (4) SA 113 (T)

Bannatyne v Bannatryne (Commission for Gender Equality as Amicus Curiae) 2003 (2) SA 363 (CC).

Bato Star Fishing v Minister of Environmental Affairs and Tourism 2004 (4) SA 490 (CC).

Ben-Yishai v Ben-Yishai 1976 (2) SA 307 (W).

Bernstein and Others v Bester NO and Others 1996 (2) SA 751 (CC).

Bethell v Bland 1996 (2) SA 194 (W).

Bhe and Others v Magistrate, Khayelitsha and Others (Commission for Gender Equality as Amicus Curiae); Shibi and Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Others 2005 (1) SA 580 (CC).

Bloem v Vucinovich 1946 AD 501.

Brink v Kitshoff NO 1996 (4) SA 197 (CC).

Broude v McIntosh 1998 (3) SA 60 (A).

C v Minister of Correctional Services 1996 (4) SA 292 (T).

C and Others v Department of Health and Social Development, Gauteng, and Others 2012 (2) SA 208 (CC).

Calitz v Calitz 1939 AD 56.

Carmichelle v Minister of Safety and Security 2001 (4) SA 938 (CC).

Case and Curtis v Minister of Safety and Security 1996 (3) SA 617 (CC).

Castell v De Greeff 1994 (4) SA 408 (C).

Centre for Child Law v MEC for Education, Gauteng 2008 (1) SA 223 (T).

Centre for Child Law v Minister of Home Affairs 2005 (6) SA 50 (T).

Centre for Child Law v Minister for Justice and Constitutional Development 2009 (6) SA 632 (CC).

Chodree v Vally 1996 (2) SA 28 (W).

Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC).

Christian Lawyers Association of SA and Others v Minister of Health and Others 1998 (4) SA 113 (T).

Christian Lawyers Association of South Africa v Minister of Health 2005 (1) SA 509 (T).

Christian League of South Africa v Rall 1981 (2) SA 821 (O).

City Council of Pretoria v Walker 1998 2 SA 363 (CC).

Clarke v Hurst 1992 (4) SA 630 (D).

CM v NG 2012 (4) SA 452 (C).

Coetzee v Meintjies 1976 (1) SA 257 (T).

Coetzee v Singh 1996 (3) SA 153 (D).

Cook v Cook 1937 AD 154.

Cronje v Cronje 1907 TS 871.

Dawood v Minister of Home Affairs 2000 (1) SA 997 (C).

Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC).

Desai v Engar and Engar 1965 (4) SA 81 (W).

Dreyer v Lyte-Mason 1948 (2) SA 245 (W).

Dunscombe v Willies 1982 (3) SA 311 (D).

Du Plessis v De Klerk 1996 (3) SA 850 (CC).

Du Preez v Du Preez 1969 (3) SA 529 (D).

Du Toit and Another v Minister of Welfare and Population Department and Others (Gay and Lesbian Equality Project as Amicus Curiae) 2003 (2) SA 198 (CC).

Edwards v Edwards 1960 (2) SA 523 (D).

Esterhuizen v Administrator, Transvaal 1957 (3) SA 710 (T).

Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa Act, 1996 1996 (4) SA 744 (CC).

Ex parte Critchfield 1999 (3) SA 132 (W).

Ex parte Die Minister van justisie: In Re S v Grotjohn 1970 (2) SA 355 (A).

Ex parte Dixie 1950 (4) SA 748 (W).

Ex parte Kommissaris van Kindersorg, Krugersdorp: In re JB 1973 (2) SA 699 (T).

Ex parte Minister of Safety and Security: In re S v Walters 2002 (4) SA 613 (CC).

Ex parte Powrie 1963 (1) SA 299 (W).

Ex parte Sakota 1964 (3) SA 8 (W).

Ex parte van Dam 1973 (2) SA 182 (W).

Ex parte van Niekerk [2005] JOL 14218 (T).

Fereira v Levin NO 1996 (1) SA 984 (CC).

Fletcher v Fletcher 1948 (1) SA 130 (A).

French v French 1971 (4) SA 57 (C).

FS v JJ and Another 2011 (3) SA 126 SCA.

G v Superintendent, Groote Schuur Hospital and Others 1993 (2) SA 255 (C).

Germani v Herf 1975 (4) SA 887 (A).

Goodrich v Botha 1952 (4) SA 175 (T).

Gordon v Barnard 1977 (1) SA 887 (C).

Government of the Republic of South Africa v Grootboom and Others 2001 (1) SA 46 (CC).

Greenshields v Wyllie 1989 (4) SA 898 (W).

H v R 2001 (3) SA 23 (C).

Hay v B and Others 2003 (3) SA 492 (W).

Heystek v Heystek 2002 (2) SA 754 T.

Hlope v Mahlalela 1998 (1) SA 449 (T).

Hornby v Hornby 1954 (1) SA 498 (O).

Horsford v De Jager (1959) (2) SA 152 (N).

I v S 2000 (2) SA 993 (C).

In re: The School Education Bill of 1995 (Gauteng) 1996 (4) BCLR 536 (CC).

J v Director General, Department of Home Affairs 2003 5 SA 605 (D).

J v J 2008 (6) SA 30 (C).

Jonker v The Manager, Gali Thembani/JJ Serfontein/Serfontein School and Others 94/2011 [2012] ZAECGHC (2012).

Jooste v National Media Ltd 1994 (2) SA 634 (C).

K v K 1999 (4) SA 691 (C).

Kaiser v Chambers (1969) 4 SA 224 (C).

Khosa v Minister of Social Development; Mahlaule v Minister of Social Development 2004 (6) SA 505 (CC).

Kirsh v Kirsh [1999] 2 All SA 193 (C).

Kleynhans v Kleyhans [2009] JOL 24013 (ECP).

Kotze v Kotze 2003 3 SA 628 T.

Krasin v Ogle [1997] 1 All SA 557 (W).

Kustner v Hughes 1970 (3) 622 (W).

Lampert v Hefer NO 1955 (2) SA 507 (AD).

Landmann v Mienie 1944 OPD 59.

Legal Aid Board v R and Another 2009 (2) SA 262 (D).

Legal Aid Board in re Four Children (unreported, 512/10 [2011] ZASCA 39 (2011)).

Louwrens v Oldwage 2006 (2) SA 161 (SCA).

Lubbe v Du Plessis 2001 (4) SA 57 (C).

Lynch v Lynch 1965 (2) SA 49 (R)

M v R (1989) (1) SA 416 (O).

Madiehe (born Ratilhogo) v Madiehe 1997 (2) All SA 153 (B).

Madyibi v Nguva 1944 NAC (C&O).

Manning v Manning 1975 (4) SA 659 (T).

Marais v Marais 1960 (1) SA 844 (C).

Märtens v Märtens 1991 (4) SA 287 (T).

Martin v Mason 1949 1 PH B9 (N) 24.

Mathews v Mathews 1983 (4) SA 136 (SE).

Mathee v MacGregor 1981 (4) SA 637 (Z).

MB v NB 2010 (3) SA 220 (GSB).

Mbambo v Swaai 1931 N.A.C. (C&O) 19.

McCall v McCall 1994 (3) SA 201 (C).

McDonald v Wroe [2006] 3 All SA 565 (C).

MEC for Education, Kwazulu-Natal and Others v Pillay and Others 2008 (1) SA 474 (CC).

Mentz v Simpson 1990 (4) SA 455 (A).

Meyer v Gerber 1999 (3) SA 650 (O).

Milstein v Milstein 1943 TPD 227.

Minister of Finance and Another v Van Heerden 2004 (6) SA 121 (CC).

Minister of Safety and Security v Carmichelle 2004 (3) SA 305 (SCA).

Minister of Welfare and Population Development v Fitzpatrick and Others 2000 (3) SA 422 (CC).

Mistry v Interim Medical and Dental Council of South Africa and Others 1998 (4) SA 1127 (CC).

Mitchell v Mitchell 1904 TS 128.

Motala v University of Natal 1995 (3) BCLR 374 (D).

Narodien v Andrews 2002 (3) SA 500 (C).

National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC).

National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC).

National Media Ltd v Jooste 1996 (3) SA 262 (A).

Niemeyer v De Villiers 1951 (4) SA 100 (T).

Nugent v Nugent 1978 (2) SA 690 (R).

O v O 1992 (4) SA 137 (C).

Oppel v Oppel 1973 (3) SA 675 (T).

O'Keeffe v Argus Printing and Publishing Co Ltd 1954 (3) SA 244 (C).

Oosthuizen v Rix 1948 (2) PH B65 (W).

P v P 2002 (6) SA 105 (N).

Patel v Minister of Home Affairs 2000 (2) SA 343 (D).

Petersen v Kruger 1975 (4) SA 171 (C).

Pharmaceutical Manufacturers Association of SA: In re: ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC).

Pinion v Pinion 1994 (2) SA 725 (D).

President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC).

Pringle v Administrator, Transvaal 1990 (2) SA 379 (W).

Prinsloo v Van der Linde 1997 (3) SA 1012 (CC).

R v H and Another 2005 (6) SA 535 (C).

Richter v Richter 1947 (3) SA 86 (W).

Richter and Another v Estate Hammann 1976 (3) SA 226 (C).

Rodgers v Rodgers 1930 TPD 469.

Rompel v Botha T.P.D., 15th April, 1953 (unreported).

Rosen v Havenga (2006) 4 All SA 199 (C).

Rwekana v Ngazana 1929 N.A.C. (C&O) 3.

Ryan v Ryan 1963 (2) PH B26 (SR).

S v A 1971 (2) SA 293 (T).

S v Hartmann 1975 (3) SA 532 (C).

S v J Unreported 695/10 [2010] ZASCA 139 (2010).

S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC).

S v L 1992 (3) SA 713 (E).

S v M 2008 (3) SA 232 (CC).

S v Makwanyane 1995 (3) SA 391 (CC).

S v Marx 1962 (1) SA 848 (N).

S v Mhlungu 1995 (3) SA 867 (CC).

S v Smorenburg 1992 CPD (unreported).

S v Williams 1986 (4) SA 1188 (A).

S v Williams 1995 (3) SA 632 (CC).

SA Medical and Dental Council v McLoughlin 1948 (2) SA 355 (A).

Seetal v Pravitha 1983 (3) SA 827 (D).

September v Karriem 1959 (3) SA 687 (C).

Short v Naisby 1955 (3) SA 572 (D).

Sijila v Masumba 1940 N.A.C (C&O) 15, Umtata.

Simey v Simey (1880-1882) 1 (SC) 171.

Simleit v Cunliffe 1940 TPD 67.

Soller No v G and Another 2003 (5) SA 430 (W).

Sonderup v Tondelli 2001 (1) SA 1171 (CC).

Stock v Stock 1981 (3) SA 1280 (A).

Swanepoel v Minister van Veiligheid en Sekuriteit 1999 (4) SA 549 (T).

Teddy Bear Clinic for Abused Children and Another v Minister of Constitutional Development and Another 2014 (2) SA 168 (CC).

Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk 1977 (4) SA 376 (T).

V v V 1998 (4) SA 169 (C).

Van der Westhuizen v Van Wyk 1952 (2) SA 119 (GW).

Van Oudenhove v Gruber 1981 (4) SA 857 (A).

Van Pletzen v Van Pletzen 1998 (SA) 95 (O).

Van Rooyen v Van Rooyen 1999 (4) SA 435 (C).

Van Rooyen v Van Rooyen [2001] 2 All SA 37 (T).

Van Rooyen v Werner (1892) SC 425.

Van Wyk v Lewis 1924 AD 438.

Vista University, Bloemfontein Campus v Student Representative Council, Vista University 1998 (4) SA 102 (O).

Volks NO v Robinson 2005 (5) BCLR 466 (CC).

Vucinovich v Vucinovich 1944 TPD 143.

W v S 1988 (1) SA 475 (N).

Weepner v Warren and Van Niekerk NO 1948 (1) SA 898 (C).

Wehmeyer v Nel 1976 (4) SA 966 (W).

Zantsi v Council of State, Ciskei 1995 (4) SA 615 (CC).

ABBREVIATIONS

CRC	Convention on the Rights of the Child
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
SALRC	South African Law Reform Commission
STDs	Sexually Transmitted Diseases
UDHR	Universal Declaration on Human Rights
UK	United Kingdom
UNICEF	United Nations Children's Fund
US	United States of America
WHO	World Health Organisation

CHAPTER ONE: INTRODUCTION

1 INTRODUCTION

Generally, parents and other holders of parental responsibility, ahead of the state and all others, bear the primary responsibility for ensuring the healthy upbringing of children. To perform this responsibility adequately, holders of parental responsibility are legally entitled to exercise wide discretion in choosing the form of upbringing suitable for children. A necessary result of this responsibility is that the state and other persons may not coercively intervene in family life unless parents have failed to achieve the minimum standards of upbringing set out by the law.¹ Whereas parental direction and guidance must be appropriate and exercised to enable the child to develop into a rationally autonomous adult, parents have considerable discretion in making decisions they consider to be best for their children. Thus, holders of parental responsibility decide what kind of education (religious or secular) their child should receive, what values the child should be socialised to accept and how the child should generally view the world.²

Beyond their legal obligation to provide children with the bare essentials of life (clothing, food, health care and an education), parents wield extensive control on how they are to provide these goods and services.³ In the same vein, the parent's right to provide religious direction to the child enables the parent, usually to the exclusion of all others, to instil the

¹ See generally BM Dickens 'The modern function and limits of parental rights' (1981) 97(4) *Law Quarterly Review* 462.

² It is generally accepted that the parental responsibility to guide and supervise the child includes the parental right to transmit particular religious and cultural values to one's own children. See, for example, *Simleit v Cunliffe* 1940 TPD 67; *Landmann v Mienie* 1944 OPD 59; *Oosthuizen v Rex* 1948 (2) PH B65 (W); *Wolfson v Wolfson* 1962 (1) SA 34 (SR); *Engar and Engar v Desai* 1966 (1) SA 621 (T); *Mentz v Simpson* 1990 (4) SA 455 (A); *W v S* 1988 (1) SA 475 (N) at 494–95; *Stassen v Stassen* 1998 (2) SA 105 (W) at 107 and *V v V* 1998 (4) SA 169 (C) at 176G and *Christian Education South Africa v minister of Education* 2000 (4) SA 757 (CC). See also N Cantwell 'The origins, development and significance of the United Nations Convention on the Rights of the Child' in S Detrick (ed) *The United Nations Convearatoires* (1992) 19, 26; N Cantwell 'The headscarves' affair' (1989) 6 *International Children's Rights Monitor* 15, 15 and JMT Labuschagne 'Parental rights to participate in a child's personality development and its religious and moral upbringing and the child's right to freedom of choice: Observations on the field of tension caused by the irrational in a human rights dispensation' (2004) 25(1) *Obiter* 41, 48-51, stating that 'it hardly needs to be substantiated' that the parental right to freedom of religion includes the right to manage the child's religious education.

³ L Robert 'The rights of parents' (1976) *Brigham Young Law Review* 693-708; arguing that parents are the best decision-makers for children and that, in the absence of child abuse, lawyers and judges have no business in family relations.

adoption of religious values of their choice.⁴ While parents are under the coercive power of the state to ensure that their children have access to an education and essential medical care when sick, parents choose the kind of education (religious or secular) and hospital (private or public) they send their children to.⁵ These responsibilities historically formed part of the common law concept of custody,⁶ but have now been statutorily incorporated into the definition of ‘care’.⁷ In the past 40 years, theorists⁸ and legal developments at the international⁹ and domestic¹⁰ levels have extended to children the right to participate in the decision-making process and to veto decisions made by adults: provided that the child in question is sufficiently mature to be rationally autonomous.

The powers parents enjoy in guiding and controlling their children potentially sets the notion of parental responsibility on a collision course with the child’s right to participate in the decision-making process and, where the child possesses the requisite competence, to make independent decisions relating to medical and reproductive health care. Further, the state has the duty to intervene in family conflicts, especially through the courts, and make decisions in the best interests of the child. Historically, the High Court as upper guardian of all minors had the power to intervene in the family to protect children from the violence, abuse or

⁴ See *Dreyer v Lyte-Mason* 1948 (2) SA 245 (W) at 251, where the Court held that a custodian may control the religious education of their minor child.

⁵ In *Myers v Leviton* 1949 (1) SA 203 (T) at 208, the Court held that custody involves the following:

- (1) The right to personal control of the minor.
- (2) Which personal control is reserved solely for the custodian parent?
- (3) The personal control is a day to day affair.
- (4) As a general rule the custodian parent is entitled to have the child with him [or her].
- (5) In the case of a difference of opinion on any point of policy, relating to education, religion, holidays, place of residence etc, the will of the custodian parent must prevail subject to the right of the other parent to satisfy the court that another arrangement is in the best interests of the minor.
- (6) That the rights of the parent who is given custody will not be interfered with nor will such parent be deprived of his right of custody unless it is shown that he is unfit to continue to have custody.

⁶ See *Kastan v Kastan* 1985 (3) SA 235 (C) at 236G, where the Court held that ‘[c]ustody of children involves day to day decisions and also decisions of longer and more permanent duration involving their education, training, religious upbringing, freedom of association and generally the determination of how best to ensure their good health, welfare and happiness’. See also CJ Davel ‘The status of children in South African private law’ in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) 35 fn 298, where the author argues that ‘custody mean[s] control over the person of a child i.e. taking responsibility for his or her physical well-being, where the child lives and where he or she is educated, as well as overseeing the child’s spiritual development and determining his or her creed’.

⁷ See section 1(1) of the Children’s Act 38 of 2005.

⁸ See generally R Farson *Birthrights: A Bill of Rights for children* (1974); J Holt *Escape from childhood: The needs and rights of children* (1974); and M Freeman (ed) *Children’s rights* Vol 1 (2004).

⁹ See articles 12 of the United Nations Convention on the Rights of the Child, GA Res 44/25, annex, 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49 (1989) entered into force 2 September 1990 (hereafter the CRC) and articles 4 and 7 of the African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990) entered into force 29 November 1999 (hereafter the African Children’s Charter).

¹⁰ See sections 10, 31 and 61 of the Children’s Act.

exploitation perpetrated by parents.¹¹ This includes the power to interfere with parental powers and set aside parental decisions that are not in the best interests of the child.¹² This study seeks to explore the interaction between the child's capacity for decision-making, parental responsibility and state intervention in decision-making. The contexts in which the discussion takes place are medical and reproductive decision-making in South Africa.

2 KEY CONCEPTS AND PRELIMINARY CONSIDERATIONS

2.1 Children, minors and adolescents

Under South African law, age plays an important role in conferring legal status on different categories of people. Following Roman law,¹³ the common law defines children from birth to the age of seven years as infants (in Latin, the terms are *infans* in the singular and *infantes* in the plural).¹⁴ Children over the age of seven years, but under the age of majority (historically set at 21 years, but now set at 18 years) are categorised as minors under the common law.¹⁵ These rules originated from Roman law, but the latter had a fairly complex system of dealing with children¹⁶ and construed minors that had attained the age of puberty (12 years for girls and 14 years for boys) as majors in certain circumstances.¹⁷

In this study, the term adolescence is used to refer to the period between 12 and 18 years of age. It may also be further sub-divided into early adolescence (involving children between 12 and 14 years) and late adolescence (involving children between 15 and 17 years). More importantly, however, section 17 of the Children's Act now provides that a person attains

¹¹ See, for example, *Botes v Daly and Another* 1976 (2) SA 215 (N) at 222A, where the Court held that the High Court's power as upper guardian of all minors was 'analogous to that of the English courts in relation to wards of court under English law'; and *Shawzin v Laufer* 1968 (4) SA 657 (A) at 662 where the Court held that its duty as upper guardian of all minors is to protect the interests of the child. Initially, the High Court's power to intervene could be exercised when the actions of parents endangered the child's life, health, morals or property. See *Calitz v Calitz* 1939 AD at 56.

¹² See N Glasser 'Taking children's rights seriously' (2002) *De Jure* 223, 223, arguing that '[t]he High Court has always been charged with determining what is best for children in all matters concerning them [and] ... was ... granted various statutory powers to intervene between parent and child'.

¹³ See, for example, B Nicholas *An introduction to Roman law* (2008) 93.

¹⁴ F Du Bois (ed) *Wille's principles of South African law* 9 ed (2009) 173.

¹⁵ See A Barratt 'How age affects status and capacity' in A Barratt (ed) *Law of persons and the family* (2012) 38, 39.

¹⁶ See A Cockrell 'Capacity to perform juristic acts: Contracts' in B Van Heerden, A Cockrell and R Keightley (eds) *Boberg's law of persons and the family* 2 ed (1999) 756, 757-64.

¹⁷ See A Rigsby *Roman law and the legal world of the Romans* (2010) 107-08.

legal majority when they reach the age of 18 years¹⁸ and construes all persons, whether infants or minors or adolescents, under the age of 18 years as ‘children’.¹⁹ Throughout this study, the term ‘child’ is used to refer to every person under the age of 18 years, but does not include an unborn foetus. In terms of South African common law, legal subjectivity begins at birth. However, an unborn foetus is deemed to have been born and acquired legal subjectivity, prior to its actual birth, if it is to his or her advantage and the child is subsequently born alive.²⁰ In some instances, it is at least arguable (though controversial) that legal subjectivity and rights can be acquired before birth, even without the application of the *nasciturus* fiction.²¹ This can be based on principles of natural justice, delictual claims or the need to avoid instances in which there is no remedy for wrongs clearly inflicted on the unborn.²² However, it is not necessary to pursue this argument further because this study is

¹⁸ Section 17 of the Children’s Act provides that ‘[a] child, whether male or female, becomes a major upon reaching the age of 18 years’.

¹⁹ See also section 28(3) of the Constitution which provides that ‘[i]n this section, child means a person under the age of 18 years’.

²⁰ See *Ex parte Administrators Asmall* 1954 (1) PH G4 (N); *Ex parte Boedel Steenkamp* 1962 (3) SA 954 (O); *Pinchin v Santam Insurance Co Ltd* 1963 (2) SA 254 (W), at 260A-C where Hiemstra J held that ‘a child does have an action to recover damages for pre-natal injuries. This rule is based on the rule of the Roman law, received into our law, that an unborn child, if subsequently born alive, is deemed to have all the rights of a born child, whenever this is to its advantage. There is apparently no reason to limit this rule to the law of property and to exclude it from the law of delict’; and *Van Heerden v Joubert NO* 1994 (4) SA 793 (A) at 796F. See also R Keightley ‘The beginning of legal personality: Birth and death’ in Van Heerden, Cockrell and Keightley (note 16 above) 28, 28-38.

²¹ In *Road Accident Fund v Mtati* 2005 6 (SA) 215 (SCA), the Supreme Court of South Africa was called to determine whether the applicant was liable for prenatal injuries suffered by an unborn child who was subsequently born alive. At paragraph 37, the Supreme Court held that the appellant’s assertion that the driver did not owe the unborn child any legal duty of care had to be dismissed because ‘such a child falls well within the area of potential danger which the driver is required to foresee and take reasonable care to avoid’. The Supreme Court drew inspiration from *Duval v Seguin* (1972) 26 DLR (3D) 418, where Fraser J of the High Court of Ontario held as follows:

Ann’s mother [Ann was the child *en ventre sa mère* at the time of the collision] was plainly one of a class within the area of foreseeable risk and one to whom the defendants therefore owed a duty. Was Ann any the less so? I think not. Procreation is normal and necessary for the preservation of the race. If a driver drives on a highway without due care for other users it is foreseeable that some of the other users of the highway will be pregnant women and that a child *en ventre sa mère* may be injured. Such a child therefore falls well within the area of potential danger which the driver is required to foresee and take reasonable care to avoid.

²² See *Road Accident Fund v Mtati* para 24 where the Court held that ‘it will be intolerable if our law did not grant an action’ for ante-natal injuries caused by the driver of a vehicle which collided with a pregnant woman. See also *Montreal Tramways Co v Léveillé* (1933) 4 DLR 337 (SCC) at 345, where the Supreme Court of Canada held as follows:

If a child after birth has no right of action for pre-natal injuries, we have a wrong inflicted for which there is no remedy, for, although the father may be entitled to compensation for the loss he has incurred and the mother for what she has suffered, yet there is a residuum of injury for which compensation cannot be had save at the suit of the child. If a right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another’s fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor. To my

mainly concerned with the participation rights of children already born alive. The terms ‘minor’ and ‘adolescent’ are sometimes used interchangeably and the term ‘mature minor’ is sometimes used to refer to a child who both ordinarily falls under the traditional definition of ‘minor’ and has the mental competence to make a particular decision.

Finally, whilst the very young also have the right to participate, this study is mainly concerned with the participation and autonomy rights of adolescents who generally have the capacities for rational action. However, since the study also seeks to find ways of balancing parental responsibility and state intervention in the context of decision-making for neonates or the very young, it is often necessary to consider the extent to which children belonging to this category should influence decisions affecting them. This approach is supported by the fact that the attainment of capacities for rational action are not necessarily tied to the attainment of a particular age and generally depends on genetic, nutritional, environmental, educational, social and other aspects of the child’s life.

2.2 Child participation

According to the Oxford dictionary, to participate means to take part or become involved in an activity. Hart defines participation as ‘the fact of being involved in the decision-making that concerns oneself and that concerns the life of the community in which one lives’.²³ In the context of children’s rights, the right to participate refers to every child’s right to be heard and to take part in processes that affect their life course. Participation involves having a ‘voice’ (control of the process) and having a ‘choice’ (control over the decision).²⁴ It often comprises four broad levels. These levels include being informed about a decision that has already been made; being consulted to express a view; having an opportunity to contribute towards influencing outcomes; and making independent decisions, including the right to veto a decision already made, provided the child in question has the intellectual and emotional competence to do so.²⁵

mind it is but natural justice that a child, if born alive and viable, should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother.

²³ R Hart *Children’s participation: From tokenism to citizenship* (Florence: UNICEF Innocenti Research Centre, 1992) 5. See also D Held ‘Between State and civil society’ in G Andrews (ed) *Citizenship* (1991) 20.

²⁴ P Parkinson and J Cashmore *The voice of the child in family disputes* (2008) 20-21.

²⁵ See G Lansdown ‘Promoting children’s participation in democratic decision-making’ (Florence: UNICEF Innocenti Research Centre, 2001).

The last two levels of participation, especially the right to make independent decisions and to veto a decision already made by an adult, indicate that rights to participation confer on children levels of autonomy relative to their maturity and competences. Theoretically, the movement towards the recognition of children's participation and autonomy rights symbolises the idea that children are active social and not appendages of their parents.²⁶ The fact that participation involves creating opportunities for children to contribute towards influencing outcomes and to make independent decisions potentially brings it into conflict with the parental duty and right to guide and assist the child in a manner they see fit. Thus, this study is mainly concerned with balancing the last two levels of participation (emphasising the autonomy aspect of participation) and parental responsibility. However, participation also performs a pacification function. This means that it facilitates the acceptance of decisions by those involved even if the ultimate outcome does not bring into account everyone's concerns, views and preferences. This function is important because it shows that participation is more than self-determination and that many decisions are made at the familial level.

2.3 Parental responsibility

The term 'parental responsibility' refers to the bundle of *duties* and *rights* to look after the child, to take all major decisions relating to the child's upbringing in such matters as where the child is to live, which school should the child attend and what medical treatment should the child take or refuse.²⁷ The effect of conferring parental responsibility on any person is to empower that person to take most decisions in the child's life. The responsibilities of the parent toward the child change as the child grows up and assumes responsibility for personal actions. First, the concept of parental responsibility is intended to emphasise that the law has moved away from 'rights' and 'powers' towards responsibilities as the main focus of parenthood.²⁸ It represents 'a distinct shift of emphasis away from proprietorial notions of

²⁶ See sections 61-6.3 of Chapter Two.

²⁷ See A Bainham 'Parentage, parenthood and parental responsibility: Subtle, elusive yet important distinctions' in A Bainham, SD Selater and M Richards (eds) *What is a parent? A socio-legal analysis* (1999) 25, 35.

²⁸ R Probert *Cretney and Probert's family law* 7 ed (2009) 242 and K Cox 'From Kramer v Kramer to Batman and Robin – the concept of parental responsibility: A comparison of the Children's Act of 1989 with the South African Children's Act 2005' in J Sloth-Nielsen and Z Du Toit (eds) *Trials and tribulations, trends and triumphs: Developments in international, African and South African child and family law* (2008) 194, 195.

“rights” and towards the idea that any powers parents have derive from duty or responsibility’.²⁹ Therefore, the language of ‘parental responsibilities’ introduces a paradigm shift from the traditional emphasis on parental power and authority over children to the recognition of duties parents owe their children.

However, the term ‘parental responsibility’ in itself involves rights, especially against third parties and the state. The South African Children’s Act³⁰ refers to ‘parental responsibilities and rights’. These are defined as ‘the responsibilities and rights referred to in section 18’. Under section 18, parental responsibilities and rights include the responsibility and right to care for the child; maintain contact with the child; act as a guardian of the child and to contribute to the maintenance of the child.³¹ Given that this dissertation is concerned with care for the child, particularly parental guidance and direction of the child, the other three elements need no further elaboration. Under the Children’s Act, care of the child includes, among other things, (a) guiding the child’s education and upbringing in a manner consistent with their developing maturity; (b) advising the child in making personal decisions and (c) ensuring that the best interests of the child is the paramount concern in all matters affecting the child.³² The parental responsibility to guide and direct the child is now rooted in section 1 of the Children’s Act which in a way domesticates the provisions of article 5 of the CRC.

Generally, incidents of parental responsibility provide checks and balances on the exercise of autonomy rights by children and enable parents to protect children against personal decisions that diminish their overall stock of the good. To a larger extent, parental responsibility is an embodiment of child protection rights and its recognition alongside child participation rights underlines the fact that children need both protection and autonomy to enjoy their rights fully. Yet, overprotection by parents or the state may give birth to socio-political exclusion and further marginalise children from the decision-making process.³³ To achieve an appropriate

²⁹ A Bainham *Children – The new law, the Children Act 1989* (1990) 21 and SM Cretney and JM Masson *Principles of family law* 6 ed (1997) 610.

³⁰ South African Children’s Act (note 7 above).

³¹ Section 18(2) of the Children’s Act. For a comprehensive definition of parental responsibility, see N Lowe and G Douglas *Bromley’s family law*, 10 ed (2007) 377.

³² Section 1(1) of the Children’s Act.

³³ C Smart ‘Power and the politics of child custody’ in C Smart and S Sevenhuijsen (eds) *Child custody and the politics of gender* (1989) 1, 3-4, stating that ‘children’s recourse to law is couched in terms of protection rather than rights, with the consequence that both the state and parents have to do things to children “for their own good”. This is constructed as operating in the best interests of the child, but it must be recognised that in this process the child, especially the young child, has little influence in determining what is in her or his best interests’; E Burman ‘Innocents abroad: Western fantasies of childhood and the iconography of emergencies’

balance between the need both to empower and to protect children, children's participation or autonomy rights should be read together with the parental responsibility to guide children.³⁴ Thus, this study seeks to explore the interaction between, on the one hand, the parental duty and right to protect, guide and direct the child in decision-making and, on the other, the duty to listen to the child and to give them opportunities to influence (or make independent) decisions if they have the competence to do so.

2.4 The public/private divide and state intervention in decision-making

The distinction between the private and public spheres of activity curbs, sometimes unfairly, government intervention in the private family.³⁵ Feminist scholars have argued that the historical invisibility of children and their rights can be located in the public-private divide.³⁶ The public/private dichotomy implies that the legal framework governing the parent-child relationship 'assigns child care responsibilities to parents, and thereby avoids public

(1994) 18 *Disasters* 238-53; CR Sunstein 'Rights and their critics' (1995) 70 *Notre Dame Law Review* 727, 734; who argues that '[p]eople who insist that their status as victims entitles them to enforce their legal rights may not conceive of themselves in ways that engender equality and equal citizenship'; S Hood, P Kelley, and B Mayall 'Children as research subjects: A risky enterprise' (1996) 10(2) *Children and Society* 117, 126, who found that they 'could not approach children directly [because] their socio-political positioning means that adults must give permission. In considering access to children, adults gave priority to the adult duty to protect children from outsiders; this took precedence over children's right to participate in the decision to talk with us'; V Morrow and M Richards 'The ethics of social research with children: An overview' (1996) 10(2) *Children and Society* 90-105, generally arguing that an over-protective attitude towards children may reduce their capacity to participate in research; N Thomas and C O'Kane 'The ethics of participatory research with children' (1998) 12 *Children and Society* 136, 138; BA LeFrançois "'It's like mental torture': Participation and mental health services' (2008) 16 *International Journal of Children's Rights* 211, 213, who argues that adults may 'veto children's decision making in the name of protection of the vulnerable'; G Van Bueren 'Children's rights: Balancing traditional values and cultural plurality' in G Douglas and L Sebba (eds) *Children's rights and traditional values* (1998) 15, 19, where the author writes about 'the high value placed on child protection at the expense of developing a cultural awareness of child participation. The traditional culture of not listening to children is not limited by geography'; and S Bessell and T Gal 'Forming partnerships: The human rights of children in need of care and protection' (2009) 17(2) *International Journal of Children's Rights* 283; 289, contends that the standard of the best interests of the child, 'when applied without understanding a child's views and experiences...can be used to contradict children's wishes and can lead to over-paternalism and adult authoritarianism'.

³⁴ CM Rogers and LS Wrightsman 'Attitudes toward children's rights: Nurturance or self-determination?' (1978) 34(2) *Journal of Social Issues* 59; MD Freeman *Rights and wrongs of children* (1983) 48; MD Freeman *The moral status of children: Essays on the rights of the child* (1997) 95, where the author argues that 'to take children's rights seriously requires us to take seriously both protection of children and recognition of their autonomy'; and T Ezer 'A positive right to protection for children' (2004) 7 *Yale Human Rights and Development Law Journal* 1, 1.

³⁵ See generally Law Commission of Canada (ed) *New Perspectives on the Public-Private Divide* (2003) vii.

³⁶ M Freeman 'Feminism and child law' in J Bridgeman and D Monk (eds) *Feminist perspectives on child law* (2000) 19, 20; H Lim and J Roche 'Feminism and children's rights' in J Bridgeman and D Monk (eds) *Feminist perspectives on child law* (2000) 227, 229 and 247; and F Olsen 'Children's rights: Some feminist approaches to the United Nations Convention on the Rights of the Child' 6 *International Journal of Law and Family* 192, 194-95 and 208.

responsibility for children'.³⁷ As a result, the state is not allowed to 'intervene in the private realm of the family, where children's needs and interests are managed by their parents'.³⁸ Since parents are legally presumed to know what is best for children and bear the obligation to determine and to do what is good for them,³⁹ there is no need for the state to enter into the family home except in cases of extreme exploitation, abuse or neglect.⁴⁰ The private-public divide thus ensures that the rights of the child remain hidden under the banner of family privacy and parental autonomy.⁴¹

From this perspective, it is evident that calls for the inclusion of children in the citizenship discourse are about making public what has traditionally been regarded as a private matter, about redrawing the boundary between the public and the private spheres. Like children, argue others, women were a protected class, but eventually found themselves fighting against gender discrimination.⁴² For Roche, whereas women and blacks have gained significant 'inclusions' in the past 160 years, children have experienced numerous exclusions from the public domain – invariably in the name of their protection and welfare.⁴³ To the extent that the private-public divide entitles parents to claim the right to control children without state intervention, it can be a recipe for the political exclusion of children from the decision-making process.

The protection of children's rights, parental responsibility and family values does not imply that the state should abdicate its role as the protector of all children within its territorial borders. Generally, the concept of state intervention arises from four strands: first, from the need to prevent the child from exercising autonomy rights in ways that threaten the very child's other basic rights and interests. This strand recognises that children are not the best

³⁷ M Minnow 'Rights for the next generation: A feminist approach to children's rights' (1986) *Harvard Women's Law Journal* 1, 9.

³⁸ Ibid.

³⁹ See JJ Rousseau *His educational theories selected from Emile, Julie and Other Writings* (1964) 92.

⁴⁰ See generally J Goldstein 'Medical care for the child at risk: On state supervision of parental autonomy' (1977) 86 *Yale Law Journal* 645.

⁴¹ For an authoritative discussion on the public/private dichotomy, see 'Feminism and the public/private distinction' (1992) 45(1) *Stanford Law Review* 1-45.

⁴² See S Firestone *The dialectic of sex: The case for feminist revolution* (1970) 72-104 and M Wald 'Making sense out of the rights of youth' (1974) 4 *Human Rights* 13, 15, where the author argues that '[t]he child's subjugated status was rooted in the same benevolent despotism that kings, husbands, and slave masters claimed as their moral right'.

⁴³ J Roche 'Children: Rights, participation and citizenship' (1999) 6(4) *Childhood* 475, 481; ML Fineman 'The politics of custody and gender: Child advocacy and the transformation of custody decision-making in the USA' in C Smart and S Sevenhuijsen (note 33 above) 27, 34 and JS Polier 'Problems involving family and child' (1966) 66 *Columbia Law Review* 305, 306.

persons to be entrusted with their own protection and may exercise autonomy rights in ways that are detrimental to their best interests, sometimes with the full blessing of their parents. Second, state intervention arises from the need to protect children against the unreasonable exercise of the responsibilities and powers that attach to the office of parenthood.⁴⁴ The abuse of these responsibilities and powers may be perpetrated by parents, guardians, caregivers, family members or anyone holding parental responsibilities and rights.⁴⁵ Thus, state intervention is primarily intended to ensure that the state protects and promotes children's rights at the family level.

Third, conflicts between parents and mature minors often require state agencies to play a mediatory role and, in some instances, determine who has a right to make a particular decision. This may require the courts to establish whether the minor in question has the legal or mental capacity to make independent decisions without parental consent or notification. More importantly, state intervention arises from the recognition that family relations are characterised by gross inequality and it is therefore necessary for the state to intervene in order to promote the rights and interests of the weaker party, whether women or children. In the main, this fourth strand challenges the traditional distinction between that which belongs to the state (the public sphere) and that which does not belong to the state (the private sphere).⁴⁶

The doctrine of state intervention recognises that boundaries between the family, society and the state are legally and socially constructed. This promotes social change, encourages law reform and counters the myth of inevitability that characterises the public/private distinction. The public/private dichotomy and family privacy marginalises children's rights as these concepts construct the family as an institution outside the law.⁴⁷ Montgomery has correctly argued that family privacy has operated to 'perpetuate structures of disadvantage by hiding them from public scrutiny' and demonstrated why it is important to draw 'lines of

⁴⁴ See section 6.2 of Chapter Three.

⁴⁵ See sections 5.2 and 6.2 of Chapter Three

⁴⁶ For a detailed discussion of the public/private distinction and the need to adopt a more guarded approach, see A Boniface *Revolutionary changes to the parent-child relationship in South Africa, with specific reference to guardianship, care and contact*, Thesis submitted in partial fulfilment of the degree of Doctor Legum in the Faculty of Law, University of Pretoria (2007) 393-97.

⁴⁷ J Goldstein, A Freud and A Solnit *Before the best interests of the child* (1980) 4, argue that 'a child's need for continuity of care by autonomous parents requires acknowledging that parents should generally be entitled to raise their children as they think best, free from state interference. This conviction finds expression in our preference for *minimum state interference* and prompts restraint in defining justifications for coercively intruding on family relationships'.

intervention’ to protect the rights and interests of defenceless members of the family.⁴⁸ Families merely have as much privacy and parents just have as much autonomy as the state, through the law, confers on them. This approach recognises that the theory of non-intervention or minimum intervention represents an elevation of parental rights over children’s rights and that appropriate state intervention promotes children’s rights. Thus, it is appropriate for the state to intervene whenever parents and children make decisions that are not in the latter’s best interests.⁴⁹

3 LEGAL BACKGROUND AND RATIONALE FOR RESEARCH

In ancient Rome and the early common law systems of Europe, from which South African private law is largely drawn, the father or *paterfamilias* had an almost absolute right over his biological child.⁵⁰ He had the power of life and death over his children and could sell them into slavery, emancipate them or cause them to be married.⁵¹ In Hobbes’ words, the child was in ‘absolute subjection’ to the father or mother, who could alienate or kill the child ‘when he or she, in his or her conscience, think it to be necessary’.⁵² Sir Robert Filmer thought that the child’s subjection to the father exists ‘by the ordination of God himself’.⁵³ In his world, ‘the father of a family governs by no other law than by his own will’ and no nation ‘allows children any action or remedy for being unjustly governed’.⁵⁴ Under both the Roman and early common law traditions, a child was *infantia*, incapable of legal speech, *innocentia*, incapable of harm, *doli incapax*, incapable of wrongful intent, *alienis juris*, outside the law, and the property of the father.⁵⁵ Children were in the same category as the mentally ill⁵⁶ and

⁴⁸ See J Montgomery ‘Children as property’ (1988) *Modern Law Review* 323, 332. At 328, the author argues:

Clearly there must be a safety net, and no non-interventionist stance can be absolute. Children must be protected against parents who fail to consider their interests but the definition of their interests is not to be given by the state in all cases. In a liberal democracy, the thresholds which justify state intervention should be defined by those interests which the children of that society have in common, not by a relatively narrow paradigm of the family created by part of that society only.

⁴⁹ For a detailed discussion on the best interests of the child and its implications for child participation, parental responsibility and state intervention, see sections 4.2 of Chapter Three and 4.2 of Chapter Four.

⁵⁰ See EL Barker and CL Hamman ‘The best interests of the child in custody controversies between natural parents: Interpretations and trends’ (1978-1979) 18 *Washburn Law Journal* 482, 483.

⁵¹ A Borkoski *Textbook on Roman law* (1994) 102-05.

⁵² T Hobbes *Leviathan* (1650) 4, 8.

⁵³ R Filmer *Patriarcha* (1650) 1, 4.

⁵⁴ *Ibid*, 3, 1.

⁵⁵ A McGillivray ‘Children’s rights, paternal power and fiduciary duty: From Roman law to the Supreme Court of Canada’ (2011) 19 *International Journal of Children’s Rights* 21, 22.

they were mainly viewed as objects of protection from harm. Latter philosophers such as Locke argued that children were not the property of their parents, but that they lacked the capacity to exercise human rights without parental guidance. Gradually, the historical emphasis on child protection began to be challenged by the growing concept of child autonomy and the notion that childhood is not a period of total incapacity to decide.

The recognition of the separate personhood of the child and the philosophical movement toward inclusion and autonomy gradually influenced the adoption and letter of the United Nations of the Convention on the Rights of the Child (CRC).⁵⁷ Scholars have observed that the adoption of the CRC announced the downfall of parental rights and the elevation of children's participation and autonomy rights. For example, Ncube claims that the emphasis on parental rights and authority is now inconsistent with international norms; which norms clearly subordinate parental rights to the rights of children.⁵⁸ Likewise, Bernard, Ward and Knoppers have contended that the CRC, especially article 12 thereof, represents 'a philosophical shift from seeing children as extensions of their parents or in the extreme as property of their parents, to seeing them as legal entities in their own rights'.⁵⁹

However, while it is evident that children's participation rights and 'evolving capacities' guide the exercise of parental responsibility in respect of children, international law still leaves room for parents to exercise rights when making day-to-day family decisions. Whereas article 12 of the CRC recognises the child as a potentially autonomous person with the ability to participate fully in society and as an individual separate from the family,⁶⁰ article 5 of the CRC casts the child as a member of the family subject to parental control and guidance in light of his or her individual capacities. Both the CRC and the African Children's Charter entrench potentially conflicting ideas on the relationship between child participation (and autonomy) and parental responsibility. For instance, what is the relationship between articles 12, 13, 14, 15 and 16 of the CRC (participation and autonomy provisions) on the one hand and articles 3, 5 and 18 of the CRC (parental responsibilities provisions) on the other?

⁵⁶ Hobbes argued that "[o]ver natural fools, children or madmen there is no law, therefore no law, no more than over brute beasts, nor are they capable of the title of just or unjust because they have never had the power to make any covenant", See *Leviathan* (note 52 above) 2, 26.

⁵⁷ See CRC (note 9 above).

⁵⁸ See W Ncube 'Re-evaluating law, tradition, custody and access to non-marital children in Zimbabwe' in W Ncube (ed) *Law, culture, tradition and children's rights in Eastern and Southern Africa* (1998) 150.

⁵⁹ C Bernard, R Ward and B Knoppers 'Best interests of the child exposed: A portrait of Quebec custody and protection law' (1992-1993) 11 *Canadian Journal Family Law* 57, 122.

⁶⁰ C Barton and G Douglas *Law and parenthood* (1995) 42.

Similarly, how do articles 3, 7, 8 and 9 of the African Children's Charter relate to articles 18, 19 and 20 of the same instrument? How do children's protection rights relate to these sets of rights? To create an appropriate balance between child participation and parental responsibility, it is thus important to analyse the relationship between these provisions.

Both the Constitution⁶¹ and the Children's Act contain a number of provisions on child participation- or autonomy-related rights and parental responsibility or care. Apart from the constitutional right to legal representation,⁶² children (and parents) also have civil rights (to privacy, dignity, and freedom of expression for instance) to which 'everyone' is entitled.⁶³ Further, the Children's Act now codifies participation as a right and a general principle.⁶⁴ Thus, the ambit of the statutory provisions on child participation rights is considered against the background of the focus South African child law places on the need to strengthen family relationships. After setting out international standards on child participation rights and parental responsibility in decision making, the study will investigate the extent to which South African law has codified these standards in domestic legislation. Further, the study discusses whether the ways in which South African law balances child participation rights and parental responsibility in decision-making and if it does not, how it should do so.

At the international level, South Africa is bound by the child participation provisions of the CRC and the African Children's Charter since the country ratified both these instruments. Regardless of the difficulties confronted by decision makers in balancing child participation rights and parental responsibility, the near universal ratification of the CRC (with its emphasis on the rights of the child) suggests the success of the children's rights movement in spearheading a global revolution of the parent-child relationship. This success is epitomised in South Africa's constitutional clause enshrining children's rights, which has also influenced the development of the Children's Act. Through section 28 of its Constitution and the Children's Act, South Africa has domesticated international fundamental rights, values and principles.

The domestication of international standards has wide-ranging legal implications. First, the explicit recognition of the child as a bearer of rights runs counter to the traditional status of

⁶¹ The Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).

⁶² Section 28(1)(h) of the Constitution.

⁶³ Sections 14-16 and 18 of the Constitution.

⁶⁴ See sections 10, 31 and 61 of the Children's Act.

the child in South African private law, in which a child had no or limited capacity to litigate and in which a parent had to act on the child's behalf.⁶⁵ Second, children can now judicially enforce their rights against intrusion by parents or the state since the Bill of Rights applies both horizontally and vertically.⁶⁶ Children can now question the authority of parents in making particular decisions. Third, in light of the child's constitutionally and statutorily guaranteed capacity to act and to litigate, the Bill of Rights and the Children's Act can both be read to imply that it is possible to separate the child's right to participate from parental rights to autonomy and non-intervention.⁶⁷ Fourth, the South African Constitution entrenches the right to legal representation. The right to legal representation implies the right to instruct counsel and constitutes another, indirect though, mode of ensuring that the child is heard.

Fifth, the codification of child participation, as a right and a general principle, in the Children's Act confirms the need to hear children in all matters concerning them. Sixth, the protection of such autonomy-related rights as privacy, dignity, bodily integrity and reproductive health care has wide-ranging implications for minors' ability to make independent decisions on medical treatment (and matters relating to reproduction), parental responsibility and state intervention in these areas of the law. The relationship between, on the one hand, child participation and autonomy rights, and, on the other, parental responsibility will be considered in detail in latter chapters. This includes an analysis of the various ways in which the Constitution and the Children's Act attempt to reconcile the tension between child participation or autonomy rights, parental responsibility and state intervention in medical and reproductive decision-making.

The need to reconcile child participation rights and parental responsibilities in decision making often arises in the context of medical and reproductive decision-making by adolescents. A child may insist on undergoing a particular operation, but a parent may be of the view that the operation is risky for the child's health. At the same time, the state may decide to intervene to ensure that the child receives life-saving treatment against the child's

⁶⁵ J Sloth-Nielsen 'Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law' (1995) 11 *South African Journal on Human Rights* 401, 402-06.

⁶⁶ See sections 8(2) and 39(2) for horizontal application of the Bill of Rights.

⁶⁷ For a detailed exposition of the changing nature of the parent-child relationship, see A Boniface, 'Revolutionary changes to the parent-child relationship in South Africa' in J Sloth-Nielsen and Z du Toit (eds) *Trials and tribulations, trends and triumphs: Developments in international, African and South African child and family law* (2008) 151.

or the parent's will.⁶⁸ Depending on what decision saves the child's life, the state may also limit or expand the child's autonomy to terminate her pregnancy or the parent's responsibility to make this decision for an incompetent child. In that light, it becomes necessary to examine whether the Constitution, the Children's Act and the Choice on Termination of Pregnancy Act create an appropriate balance between children's autonomy rights, parental responsibility and state intervention in medical and reproductive decision-making.

4 RESEARCH AIMS AND OBJECTIVES

This research seeks to explore whether South African law establishes an appropriate balance between child participation, parental responsibility and state intervention in medical and reproductive decision-making. To achieve this aim, the research addresses a number of separate but interrelated objectives. The objectives of the research are:

- To explore the scope of parental responsibility, children's rights and state intervention under various theoretical models which explain the parent-child relationship.
- To investigate the scope of children's rights and parental responsibility under international law, particularly the CRC and the African Children's Charter, and to discuss how international law balances child participation and parental responsibility in decision-making.
- To examine the scope of child participation rights, parental responsibility and state intervention under South African law and to explore the extent to which domestic law establishes an appropriate balance between these concepts.
- To examine the extent to which South African law balances child participation or autonomy rights, parental responsibility and state intervention in medical and reproductive decision-making.

5 SIGNIFICANCE OF THE STUDY

This study is important in many respects. First, the discussion takes place in the context of medical and reproductive decision-making. The primary reason for choosing these decisions

⁶⁸ On more instances in which there may be conflicts between the patient's autonomy, his or her interests and the state, see R Huxtable 'Autonomy, best interests and the public interest: Treatment, non-treatment and the values of medical law' (2014) *Medical Law Review* 1, 1-2.

is that consent to or refusal of treatment or surgery may have such dangerous effects as serious injury, permanent disability or death of the patient. Add to this the fact that there is debate on whether children have the competence to understand what each proposed medical intervention means for their medical condition. Uniformed medical decisions, with or without the support of the parents, often carry heavy consequences for the health and the life of the child. Therefore, it is necessary investigate the interaction between child autonomy rights, parental responsibility and state intervention in medical decision-making and to locate the ways in which South African law seeks to mediate conflicts between children, parents and the state. This study is important in that it seeks to fill the gap relating to the balance between the three concepts in the medical and reproductive decision-making context.

The reasons for choosing reproductive decision-making, particularly as it relates to contraception and abortion, are multi-faceted. These focus areas divide lawyers, philosophers and even health care professionals on what is legally or morally right for children. Further, children asserting autonomy in reproductive decision-making often confront counterclaims of legitimate intervention by parents or guardians responsible for caring for the child. More importantly, the non-use or improper use of contraceptives by sexually active minors may lead to the contraction of sexually transmitted diseases (STDs), unintended teenage pregnancies and unsafe abortion. These possibilities threaten the life, survival and development of sexually active adolescents. It is therefore necessary to investigate whether the domestic regulation of this field of the law is in keeping with the best interests of the child.

From a theoretical perspective, the study departs from the traditional dichotomy drawn between child autonomy and protection rights. Historically, theorists have been divided between those who advocate children's autonomy from all forms of control and those who advocate more protection and less autonomy for children. The first category of theorists has been classified as child liberationists and in this group fall scholars like Holt, Farson, Aries and many others. Followers of these scholars conceive personal autonomy as the genesis of children's rights and the ground from which all other rights flow.⁶⁹ Then, there are scholars

⁶⁹ See generally M Freeman *The rights and wrongs of children* (1983) 22-23; M Freeman 'Taking children's rights more seriously' (1992) 6 *International Journal of Law and the Family* 52 and D Husak 'Paternalism and autonomy' (1981) 10(1) *Philosophy and Public Affairs* 27-46.

who value more protection than autonomy.⁷⁰ This category of scholars is of the view that if not protected or controlled by parents, families, communities and state agencies, children would engage in dangerous and self-destructive behaviour due to the lack of capacity for rational autonomy.⁷¹

The approach taken in this thesis is that children need both protection and some degree of autonomy for them to develop into rational, balanced and well-rounded individuals. While protection comes in the form of parental responsibility, autonomy in decision-making comes in the form of a version of child participation rights that recognises the importance of the evolving capacities of the child. The idea that children need both autonomy and protection is not new, but the study is important in that it seeks to demonstrate how parental responsibility, child participation and state intervention ought to be resolved in the context of specific decisions such as medical treatment, surgical operations and abortion.

From a legal perspective, the study is also important in that it traces the tension between parental responsibility and child participation back to the international legal framework and the South African legal system. In other words, the study is not limited to analysing just the South African legal system, but seeks to investigate the way in which legal theory and international law harmonise the tension between child participation (an offshoot of autonomy rights) and parental responsibility (an offshoot of protection rights). This is important in that international human rights instruments to which South Africa is a State Party generate obligations with which this country must comply. These instruments set minimum standards below which the conduct of state agencies should not fall. Thus, the study is important in that it does not limit its inquiry to South African laws, but investigates the degree to which international laws have influenced and shaped legal developments in South Africa.

From an academic perspective, the study fills up a huge gap created by the shortage of scholarship on the relationship between children's rights, parental responsibility and state intervention. As demonstrated in the literature review, while there is abundant scholarship on both child participation and parental responsibility, there is a dearth of such scholarship on

⁷⁰ See BC Hafen and JO Hafen 'Abandoning children to their autonomy: The United Nations Convention on the Rights of the Child' (1996) 37 *Harvard Journal of International Law* 449.

⁷¹ For spirited attacks on child autonomy and state intervention, see BC Hafen and JO Hafen 'Abandoning children to their autonomy: The United Nations Convention on the Rights of the Child' (1996) 37(2) *Harvard International Law Journal* 449 and J Goldstein, A Freud and A Solnit *Beyond the best interests of the child* (1973).

the relationship between these concepts; particularly on the extent to which the developing competencies of the child and state intervention affect parental responsibility in reproductive and medical decision-making.

Children live in families and communities populated by other human beings and their rights cannot be discussed in isolation. It is important to investigate the relationship between their participation or autonomy rights and the rights of the immediate members of the family. A child's actions, especially when driven by the desire to be an independent person, are more likely to affect the rights of parents (and holders of parental responsibility) and it is important that there be academic work built on this premise and taking cognisance of this fact. This is important because current literature negates the importance of the family and the role parents play in fostering a culture of respect for children's rights.

From a practical perspective, the study is important in that it provides guidance to state agencies, policy-makers, communities and organisations working with or for children on how to promote child participation rights without negating the important responsibilities performed by parents and the state in ensuring that the child develops into an autonomous and rational individual. There is almost an assumption that the idea of children's rights (especially participation and autonomy rights) is incompatible with parental rights and responsibilities. This thesis is important in that it seeks to provide some light on how state agencies and local communities can promote a version of participation rights that is consistent with the parental responsibility to guide and control the child. It advances the more balanced view that the delicate status of childhood requires society to always balance child autonomy and protection when promoting children's rights in various contexts.

6 LITERATURE REVIEW

Literature on child participation and autonomy rights is not in short supply and many authors have, across several legal systems, written about the subject from different perspectives.⁷²

⁷² See generally J Eekelaar 'The best interests of the child and the child's wishes: The role of dynamic self-determinism' in P Alston (ed) *The best interests of the child: Reconciling culture and human rights* (1993) 42; P Alderson *Listening to Children: Children, Ethics and Social Research* (1995); MF Lucker-Babel 'The right of the child to express views and to be heard: An attempt to interpret article 12 of the UN Convention on the Rights of the Child' (1995) 3 *International Journal of Children's Rights* 391; M John (ed) *Children in Charge: A Child's Right to a Fair Hearing* (1996); J Boyden and J Ennew *Children in Focus: A manual for participatory*

The focus on children's participation and autonomy has been so profound that the *International Journal of Children's Rights* devoted the whole of its third issue in the year 2008 to child participation in decision making.⁷³ At the international level, child participation in decision-making has emerged as one of the topical areas of interest post-1989. Legal academics, judges and practitioners have written widely about how and why children should be informed about decisions that concern them, why they should be given an opportunity to express their views, to influence decisions and even to decide for themselves. The literature survey clearly reveals that the case for child participation and autonomy based on the particular child's competence rather than the child's age has been successfully made.⁷⁴ Similarly, there is a growing body of literature on the pressing need to consider the views of the child in health care decision making,⁷⁵ adoption, education and law- and policy-making.⁷⁶ However, very few scholars have written about child participation or autonomy rights in the

research with children (1997); M Hill 'Participatory research with children' (1997) 2 *Child and Family Social Work* 171-83; N Thomas C O'Kane *Children and decision Making: A summary report* (1998); N Thomas and C O'Kane 'When children's wishes and feelings clash with their best interests' (1998) 6 *International Journal of Children's Rights* 137; S Mushcroft *Children's rights: Reality or rhetoric? The UN Convention on the Rights of the Child: The first ten years* (International Save the Children Alliance; 1999) 16; A Anderson and A Spijker 'Considering the view of the child when determining her best interest' (2002) *Obiter* 365; H Matthews 'Children and Regeneration: Setting an agenda for community participation and integration' (2003) 17(4) *Children and Society* 264; M Freeman 'Children's health and children's rights: An introduction' (2005) 13 *International Journal of Children's Rights* 1; J Tobin 'Increasingly seen and heard: The constitutional recognition of children's rights' (2005) 21 *South African Journal on Human Rights* 86; N Taylor, P Tapp and M Henaghan 'Respecting children's participation in family law proceedings' (2007) 15(1) *International Journal of Children's Rights* 61; D Archard and M Skivenes 'Balancing a child's best interests and a child's views' (2009) 17(1) *International Journal of Children's Rights* 1; and T Cockburn 'Children's participation in social policy: Inclusion, chimera or authenticity?' (2005) 4(2) *Social Policy and Society* 109.

⁷³ See R Hinton, KEM Tisdall, M Gallagher and S Elsley 'Children's and young's participation in public decision-making' (2008) 16(3) *International Journal of Children's Rights* 281; R Hinton 'Children's participation and good governance: Limitations on the theoretical literature' (2008) 16(3) *International Journal of Children's rights* 285; MB Udi 'Children's participation in Brazil – A brief genealogy and recent innovations' (2008) 16(3) *International Journal on children's rights* 301; A Rampal 'Scaffolded participation of children: Perspectives from India' (2008) 16(3) *International Journal of Children's Rights* 313; M Taylor and B Percy-Smith 'Children's participation: Learning from and for community development' (2008) 16(3) *International Journal of Children's Rights* 379; M Gallagher 'Foucault, power and participation' (2008) 16(3) *International Journal of Children's Rights* 395; J Hart 'Child participation and international development: Attending to the political' (2008) 16(3) *International Journal of Children's Rights* 407 and KEM Kisdall 'Is the honeymoon over? Children and young people's participation in public decision-making' (2008) 16(3) *International Journal of Children's Rights* 419.

⁷⁴ See G Lansdown *The evolving capacities of the child* (Florence: UNICEF Innocenti Research Centre 2005) and M Freeman 'The best interests of the child? Is the best interests of the child in the best interests of the child?' (1997) 11 *International Journal of Law, Policy and the Family* 361.

⁷⁵ F Schoeman 'Parental discretion and children's rights: Background and implications for medical decision-making' (1985) 10(1) *Journal of Medicine and Philosophy* 45-62; M Shaw 'Competence and consent to treatment in children and adolescents' (2001) 7 *Journal of Continuing Professional Development* 150-59; A Franklin and P Sloper 'Listening and responding? Children's participation in health care within England' (2005) 13 *International Journal of Children's Rights* 11 and M Freeman 'Removing rights from adolescents' in Y Ronen and CW Greenbaum (eds) *The case for the child: Towards a new agenda* (2008) 309.

⁷⁶ M Delplace 'Participation rights of children' in F Ang, E Berghmans, L Cattijssse and M Delplace (eds) *Participation rights of children* (2006) 163.

South African context⁷⁷ and even fewer have written about how these rights relate to parental responsibility and state intervention in medical and reproductive decision-making in South African law.⁷⁸ At least one sub-regional study on child participation in Southern Africa has been written, covering South Africa, Swaziland and Zambia.⁷⁹ This study, based on empirical research, is important in that it unearths some of the barriers to child participation in South Africa and the other countries involved.

According to the study, children are not often heard because adults are not ready for child participation and continue to feel threatened by the prospect of ‘giving power’ to young people; children are not used to having their views heard and taken seriously; there is a lack of recognition of children’s capacities and a general lack of creativity (in the school and home systems) in seeking different ways of engaging with children; there is a lack of resources to sustain child participation initiatives, particularly advocacy; and there are limited projects simultaneously involving child and adult participants. Further, finds the study, the fact that time is needed to build relationships and change mindsets (of children and adults) means that the road to genuine participation is generally longer than is ordinarily thought or expected.⁸⁰ However, the study does not address the issue of child participation in medical or health care decision-making, but deals with other sectors such as governance, the media and decision-making in school settings.

In 2002, Save the Children Sweden commissioned a study to investigate South African children’s own views and experiences of their rights and violations thereof. The aim of the study was to underline the importance of listening to children’s views and to assist the state and other relevant NGOs to focus their work around issues identified as being of importance to children.⁸¹ The right to participation (understood in this context as the right to be heard and taken seriously) was ranked by children as the third most commonly violated right (following

⁷⁷ See J Geldenhuys and H Doubell ‘South African children’s voice on school discipline: A case study’ (2011) 19 *International Journal of Children’s Rights* 321; C Gwandure and T Mayekiso ‘Promoting children’s public participation in South Africa: A social systems control perspective’ (2011) 19 *International Journal of Children’s Rights* 233 and L Jamieson, R Bray, A Viviers, L Lake, S Pendlebury and C Smith (eds) ‘*Children as citizens: Participating in social dialogue*’ *South African Child Gauge* (2010-2011).

⁷⁸ See C Himonga and A Cooke ‘A child’s autonomy with special reference to reproductive medical decision-making in South African law: Mere illusion or real autonomy’ (2007) 15 *International Journal of Children’s Rights* 333.

⁷⁹ See Save the Children Sweden, *Regional study on child participation in Southern Africa* (March 2010).

⁸⁰ *Ibid*, 45.

⁸¹ G Clacherty and D Donald *South African Child Rights Survey: Children’s Poll* (Pretoria: Save the Children Sweden; 2002) 3.

the right to a safe environment and the right to protection from abuse).⁸² In discussing the right to participation, children implicated parents and the home environment as the arena in which this violation is experienced most, raising issues of power in relationships between adults and children.⁸³ This was seen to undermine their ability to be involved in decision-making, as ‘adults make the decisions because they have the power’.⁸⁴ Inferences from work on child participation indicate that young people are given little room as independent actors because autonomy is seen as an end goal of childhood development.⁸⁵ Citing Shelmerdine, Moses notes that ‘in neighbouring poor and predominantly ‘coloured’ and ‘black’ townships, clear lines of authority between adults and children also prevail. Shelmerdine (2006) describes how children’s obedience and adults’ control are valued in both the ‘coloured’ and ‘black’ townships, with the former drawing on moral and religious values to justify adult authority, and the latter drawing on cultural values’.⁸⁶

Some of the work written by leading academics in South Africa is committed to showing that existing legal and social practices elevate the best interests principle at the expense of children’s participation in decisions that affect their well being. Dr Barratt, for instance, once expressed concern about the relegation of the child’s voice to the margins of the legal process and proffered the view that the South African legal system lacked procedural guarantees to foster children’s participation in decisions that affect them.⁸⁷ However, most of her remarks have been outdone by the passage into law of the Children’s Act and there is limited academic work anchored on or analysing the provisions of the new law. To address this gap, this study contains a chapter analysing the constitutional and statutory provisions on child participation and parental responsibility.

⁸² Ibid 9.

⁸³ Ibid.

⁸⁴ Ibid, 10.

⁸⁵ A Armstrong, M Chuulu, C Himonga, P Letuka, K Mokobi, W Ncube, T Nhlapo, B Rwezaura and P Vilakazi ‘Towards a Cultural Understanding of the Interplay between Children’s and Women’s Rights: An Eastern and Southern African perspective’ (1995) 3 *International Journal of Children’s Rights* 333.

⁸⁶ S Moses ‘Children and participation in South Africa: An overview’ (2008) 16 *International Journal of Children’s Rights* 327, 332.

⁸⁷ See A Barratt ‘The best interest of the child: where is the child’s voice?’ in S Burman (ed) *The fate of the child: Legal decisions on children in the new South Africa* (2003) 141, 151-56 and N Zaal ‘Hearing the voices of children in court: A field study and evaluation’ in S Burman (ed) *The fate of the child: Legal decisions on children in the New South Africa* (2003) 158.

While there is a plethora of published materials on parental responsibility⁸⁸ and child participation or autonomy rights,⁸⁹ the two discourses on these related aspects of family law are rarely reconciled. Eekelaar is one of the few leading authors to have linked the emergence of children's rights to the fall of parental rights.⁹⁰ Thus, much talk about the relationship between child autonomy and parental responsibility is premised on the belief that for children to fully exercise human rights and freedoms, respect for parental rights should necessarily be reduced.⁹¹ The mainstream position tends to construe human rights protection as a zero-sum game in which children's gains are adults' losses, rather than as a uniform enterprise in which the rights of children add value to the existing body of parental rights.⁹² However, the tendency to equate simplistically children's participation or autonomy rights to the absence of parental control is in danger of undermining a legitimate parental role in adolescent development and decision-making. As Bainham observes:

The choice has too often been presented between parental authoritarianism and self-determination for adolescents. *This is a wholly unrealistic choice which does not reflect the nature of family life.* It pays insufficient regard for the adolescent's interest in (and right to?) parental support, direction and guidance in making the difficult transition from minority to adulthood. While the law should, and clearly does, impose limits on parental authority, it should not deny its existence altogether (emphasis added).⁹³

Many lawyers think that conflicts between parents and children should be solved by coming down on one side of the line or the other.⁹⁴ This reflects the legal profession's search for certainty; that is there must be someone with the right to make decisions and the identity of that person must be determined by the application of clearly stipulated legal rules. According

⁸⁸ See BM Hoggett and DS Pearl *The family, law and society: cases and materials* (1993); BM Hoggett *Parents and children: The law of parental responsibility* (1993) and R Probert, S Gilmore and J Herring (eds) *Responsible parents and parental responsibility* (2008).

⁸⁹ E Brems 'Children's rights and universality' in JCM Willems (ed) *Developmental and autonomy rights of children*, 2 rev ed (2007) 11; AB Smith 'Rethinking childhood: The inclusion of children's voice' in Y Ronen and CW Greenbaum *The case for the child: Towards a new agenda* (2009) 15; and E Ochaita and MA Espinosa 'Children's participation in family and school life: A psychological and developmental approach' (1997) 5(5) *International Journal of Children's rights* 279.

⁹⁰ See J Eekelaar 'The eclipse of parental rights' (1986) 102 *Law Quarterly Review* 4 and J Eekelaar 'The emergence of children's rights' (1986) 6(2) *Oxford Journal of Legal Studies* 161.

⁹¹ See *Gillick v West Norfolk and Wisbech AHA and Department of Health and Social Security* [1986] 1 AC 112 170D-E and P Montague 'The myth of parental rights' (2000) 26 (1) *Social Theory and Practice* 47-68 (2000).

⁹² See BB Woodhouse 'The constitutionalisation of children's rights: Incorporating emerging human rights into constitutional doctrine' (1999-2000) 2 *University of Pennsylvania Journal of Constitutional Law* 1.

⁹³ A Bainham 'Growing up in Britain: Adolescence in the post-Gillick era' in JM Eekelaar and P Sarcevic *Parenthood in modern society: Legal and social issues for the twenty first century* (1993) 502.

⁹⁴ See J Herring 'Welfare principle and the rights of parents' in Bainham, Sclater and Richards (note 27 above) 89, 101.

to this approach, if the law is in favour of the child's right to make personal decisions, it must necessarily be against the parent's right to guide, direct and decide for the child. Yet, a modest model of democratic decision-making in the family should provide for proper consideration and weight to be given to the views of both parents and children. Scientific, developmental and empirical studies on adolescents do not lend support to the view that adolescents either wish to have or would benefit from an extreme version of liberation that would give them 'adult' capacities and complete autonomy from parental guidance and direction.⁹⁵ In many instances, the majority of adolescents remain in the family home; are dependent on their parents for food, housing, school and medical costs; and cannot be expected to exercise total independence from parental control.

South African law, particularly the Children's Act, potentially embodies an imaginative attempt to strike a difficult balance between the interests of children in pursuing autonomy as they grow older and the interests of parents in providing guidance and control. The new law anticipates the ways in which conflicts between parents and children or between children and persons (or institutions) performing parental responsibility should be solved. However, save for a few exceptions, most of the relevant provisions of the Act have not been the subject of academic comment and debate. While there are scholarly comments on parental rights and responsibilities under the new law,⁹⁶ these are hugely committed to defining the relevant terms; stating the elements of parental responsibilities and rights; explaining the ways in which these responsibilities can be achieved and terminated; and explaining the circumstances in which parental responsibilities and rights can be shared between several persons.

⁹⁵ See generally E Sowell, PM Thompson, KD Tessner and AW Toga 'Mapping continued brain growth and gray matter density reduction in dorsal frontal cortex: Inverse relationships during post-adolescent brain maturation' (2001) 21(22) *The Journal of Neuroscience* 8819, 8819; T Grisso 'What we know about youth's capacities' in T Grisso and RG Schwartz (eds) *Youth on trial: A developmental perspective on juvenile justice* (2000), 267-69; AL Green 'Future-time perspective in adolescence: The present of things future revisited' (1986) 15 *Journal of Youth and Adolescence* 99; W Gardner and J Harman 'Adolescents' AIDS risk-taking: A rational choice perspective' in W Gardner, S Millstein and B Wilcox (eds) *Adolescence in the AIDS epidemic* (1990) 19, 25-26; ES Scott, NB Reppucci and JL Woolard 'Evaluating adolescent decision-making in legal contexts' (1995) 19(3) *Law and Human Behaviour* 221 and R Mnookin 'Children's rights: Beyond the kiddie libbers and child savers' (1978) 7 *Journal of Clinical Child Psychology* 163.

⁹⁶ See A Skelton 'Parental responsibilities and rights' in T Boezaart (ed) *Child law in South Africa* (2009) 62 and C Himonga 'Children' in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 170-213.

Similarly, there are scholarly writings on legal representation (which promotes child participation through a representative),⁹⁷ child participation⁹⁸ and the extent to which South African law generally grants or denies autonomy to children.⁹⁹ However, analyses of the relationship between child participation or autonomy rights and the parent's responsibility to guide the child remains limited and there is a gap on how these potentially conflicting concepts relate to each other. Even in cases where it is concluded that the child possesses the capacity and maturity to make a particular decision, it is not yet clear how this precisely relates to parental responsibility. Whether the effect of giving children capacity by statute is to deprive parents of any right to be informed about what will happen to their child or to preclude parents from guiding their children, remains unclear. This study explores these issues through the lens of medical, reproductive and surgical decision-making.

Towards the close of the last decade of the 20th century, Ngwena wrote an incisive article on the limits of child participation in health care decision-making. In that article, he observed that 'there is virtue in legally recognising the child as a competent or autonomous person in certain circumstances, depending on the nature of the task at hand and the age or maturity of the child, not least because it constitutes a tangible expression of respect for self-determination and an affirmation of the child's dignity as a human subject rather than a mere object'.¹⁰⁰ More importantly, like many other general readings on children's capacity to consent to medical treatment,¹⁰¹ Ngwena observed that the determination on whether the child can autonomously make a treatment decision largely depends on the intelligence and

⁹⁷ See C Du Toit 'Legal representation of children' in Boezaart (note 96 above) 93-111; B Mushowe *Legal representation of children in care and protection proceedings in South Africa: An evaluation of the best interests and client-based approaches*, Thesis submitted in partial fulfilment of the requirements of a Masters Degree in Child Care and Protection, Faculty of Law, University of KwaZulu Natal (2008) 27-56; *Soller No v G and Another* 2003 (5) SA 430 (W) para 26; *Du Toit and Another v Minister of Welfare and Population Department and Others (Gay and Lesbian Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC) para 3; and *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) 787.

⁹⁸ See Moses (note 86 above) 327-42.

⁹⁹ See *S v M* 2008 (3) SA 232 para 18; T Boezaart 'Child law, the child and South African private law' in Boezaart (note 95 above) 3-37; and A Skelton 'Severing the umbilical cord: A subtle jurisprudential shift regarding children and their primary caregivers' (2008) *Constitutional Court Review* 1-18.

¹⁰⁰ C Ngwena 'Health care decision-making and the competent minor: The limits of self-determination' (1996) *Acta Juridica* 132.

¹⁰¹ T Grisso and L Vierling 'Minors' consent to treatment: A developmental perspective' (1978) 9 *Professional Psychology* 412-27; P Alderson *Children's consent to surgery* (1993); LA Weithorn and SB Campbell 'The competence of children and adolescents to make informed consent in treatment decisions' (1982) 53(6) *Child Development* 1589; C Lewis 'A comparison of minors' and adults' pregnancy decisions' (1980) 50 *American Journal of Orthopsychiatry* 446; AH Swartz 'Children's competence of research hospitalisation' (1972) 287 *New England Journal of Medicine* 589 and S Lieken 'Minors' assent or dissent in medical treatment' in *President's Commission for the Study of Ethical Problems in Medicine and Biological and Behavioural Research, Making Health Care Decisions* 3 (1987) 175-91.

maturity of the child and the nature of the treatment procedure in question.¹⁰² However, his discussion mainly relies on the common law and the provisions of section 39(4)¹⁰³ of the now repealed Child Care Act.¹⁰⁴

The Children's Act now regulates child participation in decision-making. This comprehensive piece of legislation regulates almost every aspect of family and child law – from child participation to parental responsibility, medical treatment, contraception, surgical operations and many more. There are numerous writings on the statutory governing children's consent to medical and reproductive decision-making,¹⁰⁵ but these writings just state who has the right to make a decision in certain circumstances, with no detailed exposition of how children's capacities for rational autonomy relate to parental responsibility and state intervention in decision-making. Nonetheless, local courts have not yet been asked to pronounce on many of the issues covered in this study and there are few reported cases dealing directly with the interpretation of provisions governing parental responsibility and minors' competence to consent to medical treatment and surgical operations. In respect of the Choice on Termination of Pregnancy Act – which is the prevailing law regulating abortion – there are few written works and decided cases expressing the view that children have the autonomy to terminate their pregnancy provided certain conditions are met.¹⁰⁶

7 HYPOTHESIS

This study is premised on the assumption that the recognition of children's participation and autonomy rights has led to the gradual erosion of parental rights and family privacy. Child participation and autonomy rights are the product of historical and philosophical attempts to

¹⁰² Ngweni (note 100 above) 139.

¹⁰³ Section 39(4) of the Child Care Act provided as follows:

Notwithstanding any rule of law to the contrary-

(a) any person over the age of 18 years shall be competent to consent, without the assistance of his parent or guardian, to the performance of any operation upon himself; and

(b) any person over the age of 14 years shall be competent to consent, without the assistance of his parent or guardian, to the performance of any medical treatment of himself or his child'.

¹⁰⁴ Act 74 of 1983.

¹⁰⁵ See D Kassan and P Mahery 'Special child protective measures in the Children's Act' in Boezaart (note 96 above) 185; D McQuoid-Mason 'Provisions for consent by children to medical treatment and surgical operations, and duties to report child and aged persons abuse' (2010) 100 (10) *South African Medical Journal* 646; and D McQuoid-Mason 'Some consent and confidentiality issues regarding the application of the Choice on Termination of Pregnancy Act to girl-children' (2010) 3(1) *South African Journal of Bioethics and Law* 12.

¹⁰⁶ See *Christian Lawyers Association of SA & Others v Minister of Health and Others* 1998 (4) SA 1113 (T) and *Christian Lawyers' Association v National Minister of Health and Others* 2005 (1) SA 509 (T).

challenge parental control of children and these attempts have now been replicated in international and domestic laws, including laws relating to medical and reproductive decision-making.

8 METHODOLOGY

In addressing the objectives of this study, the approach taken is theoretical in nature and involves an analysis of relevant legal instruments in international and domestic law. Given that the aim of the study is not to investigate whether children are practically heard in concrete situations, but to examine whether international and domestic law balances child participation rights, parental responsibility and state intervention, the study does not embark on empirical research. Instead, the study largely relies on primary and secondary theoretical sources to address the issues that arise from the rationale for research.

At the primary level, the study predominantly relies on United Nations official documentation; *travaux préparatoires* to various treaty documents; and international and regional child rights instruments binding on South Africa. At the centre of these instruments are the CRC and the African Children's Charter. Further, the study relies on provisions of the South African Constitution; national statutes; relevant case law; government briefings; and reports on reviews of national legislation applicable to children. The focus on domestic instruments and case law is important for discussions in chapters specifically tackling issues relating to the legal regulation of child participation and parental responsibility in South Africa.¹⁰⁷

At the secondary level, information on child participation and parental responsibility is contained in books; journal articles; internet sources; general comments of the United Nations treaty bodies, newspaper articles; special reports; reviews of relevant legislation; occasional, discussion, conference papers, newspapers and other papers. Books and journal articles stand out as the leading secondary sources on child participation rights and parental responsibility. The discussion on the theoretical evolution of the parent-child relationship will mainly be based on foreign authorities. This is because there is a dearth of literature on theories of children's rights and parental responsibility in South Africa. The only authority on the theory

¹⁰⁷ See Chapters Four, Five, Six and Seven.

of children's rights is Sonia Human, but she also writes at a very general level, with no specific reference to the South African legal system.¹⁰⁸ Besides, international instruments largely borrow greatly from Western philosophical traditions because children's rights originated from Western Europe as many countries from this region spearheaded the drafting and adoption of the CRC. Therefore, reference is made to philosophical developments which shaped the historical evolution of the parent-child relationship in the common law systems of Europe and North America.

This study seeks to explore the relationship between child participation, parental responsibility and state intervention; using international law as the normative standard with which South African law should comply. Thus, in exploring the content and scope of child participation rights and parental responsibility in international law, the study draws from academic commentary on relevant provisions of the CRC and the African Children's Charter. Further, the study also relies on documents, general comments and responses (to country reports) compiled by the Committee on the Rights of the Child. Relevant literature also includes writings of academics, international agencies such as the United Nations Children's Funds (UNICEF) and Save the Children, and civil society organisations working for or with children.

At the domestic level, the study partly adopts a descriptive and interpretive approach; analysing the scope of the provisions of the Constitution, the Children's Act, the National Health Act and the Choice Act. In analysing the scope of relevant legislation and the degree to which South African law complies with international provisions on child participation, the study largely draws from decisions of the local courts, issue papers, discussion papers, reports arising from reviews of domestic legislation (particularly the review of the now repealed Child Care Act) and the writing of leading authorities in this country. These sources are important in both locating the proper interpretation to be given to applicable legislation and proposing the way tensions between child participation, parental responsibility and state intervention ought to be resolved in concrete situations.

In addressing questions concerning challenges that arise from attempts to balance child participation, parental responsibility and state intervention in medical and reproductive

¹⁰⁸ See S Human 'The theory of children's rights' in T Boezaart (note 96 above) 243-62.

decision-making, the study draws inspiration from court judgments and leading authorities in England and the United States. Whilst there is extensive reference to local judgments and academic writings, these sources mainly focus on the scope of child autonomy in medical and reproductive decision-making, but they hardly examine the scope of parental responsibility and state intervention in this area of the law.

Given the lack of judicial guidance on, for instance, how to balance child autonomy, parental guidance and state intervention in contraceptive and medical decision-making, it is important to look to other jurisdictions for inspiration and support. This is because some of these issues have not been historically extensively legislatively regulated the way they now are today; creating a huge knowledge gap on how exactly child autonomy rights relate to parental guidance and state intervention in medical and reproductive decision. While foreign sources are not authoritative in the domestic landscape, they serve as persuasive authority for cementing particular views and provide a useful basis upon which to critique domestic shortcomings in tackling the tension between child participation, parental responsibility and state intervention. Foreign authorities remain useful in supporting suggestions on how to address current interpretive gaps on the relatively new provisions of the Children's Act.

9 CHAPTER SYNOPSIS

This chapter has introduced the subject; defined key terms, traced the legal background to the study and discussed the literature review, research questions, hypothesis, significance and methodology of the study. Apart from discussing these components, this chapter has identified the legal problem with which this study deals; namely the tension that arises between parental responsibility and child participation or autonomy. It has shown that the growing acceptance of participation and autonomy rights raises great uncertainty concerning the relationship between the responsibilities of parenthood and the capacities of children, particularly adolescents.

Chapter Two traces the historical and philosophical evolution of the parent-child relationship with the aim of identifying theoretical models which possibly ground child participation, parental responsibility and state intervention in decision-making. It explores the origin and

content of such theoretical models as the property theory of rights, the fiduciary model, paternalism and the interest theory of rights.

Chapter Three explores the reach of the provisions governing child participation rights and parental responsibilities in international law. Whilst it refers to other provisions and relevant instruments, the chapter revolves around articles 12 and 5 of the CRC – provisions which respectively codify child participation rights and parental responsibilities. The ambit of these provisions and the relationship between them are explained in great detail. In the process, Chapter Three explains the extent to which the child's developing maturity expands and limits individual autonomy as well as the degree to which parents are bound to restrict or expand children's autonomy. South African domestic laws must comply with international law as the latter provides guidance and should inspire legal developments in the country. In the absence of a comparative investigation of the reconciliation of child participation, parental responsibility and state intervention in other jurisdictions, international law stands as a workable standard against which the appropriateness of South African law should be measured.

Chapter Four analyses the different ways in which South African law has recognised the separate status of children and how this has gradually resulted in the characterisation of children as legal subjects entitled to exercise human rights independently. Further, the chapter discusses the content of child participation rights, parental responsibility and state intervention under municipal law and examines the extent to which these provisions comply with international law. Thus, Chapter Four discusses the ways in which the Children's Act seeks to reconcile child participation rights and parental responsibility in decision-making, and the circumstances in which the state is allowed to intervene in the best interests of the child.

Chapter Five investigates whether and if so, how the Children's Act balances child autonomy rights, parental responsibility and state intervention in medical decision-making. It examines the usefulness of the factors that are considered in determining whether a particular child should exercise autonomy in medical decision-making, locates circumstances in which parents are entitled to make treatment decisions for children and explains circumstances in which the state interferes with medical decisions affecting children.

Chapter Six explores how the Choice Act the tension between child autonomy, parental responsibility and state intervention in reproductive decision-making. It locates the circumstances in which children are allowed to make reproductive decisions, explains the role of parents or the state and identifies some areas of reform.

Chapter Seven concludes the discussion.

CHAPTER TWO: THE HISTORICAL AND PHILOSOPHICAL EVOLUTION OF THE PARENT-CHILD RELATIONSHIP

1 INTRODUCTION

Throughout history, different theories have been developed to explain the nature of the parent-child relationship and the proper role of the state in regulating this relationship. Traditionally, parents have had the main responsibility to teach, nurture and care for their children. To enable parents to exercise this role efficiently, many societies have historically conferred on them absolute autonomy to make decisions on the welfare and education of children.¹ Communities strongly protected parental autonomy. This was partly because parenting was largely seen as a private matter and parents were assumed to act in their children's interests. Gradually, it became evident that not all parents acted in their children's interests and the concept of parental autonomy was redefined to include not only autonomy rights against the state, but responsibilities towards the child and some degree of public accountability for parenting. Restrictions of parental autonomy largely emerged from two paradigms: 'the interests of the state as the guardian of children and the interests of children as autonomous individuals with independent rights'.² The central purpose of both paradigms is to protect children³ and this purpose overrides parental autonomy.

To begin with, the state has an interest in safeguarding the welfare of children. It is *parens patriae* of all children in its territorial borders⁴ and possesses wide powers to limit parental

¹ See for instance *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) observing that '[it] is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder...And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter'.

² EM Chiu 'The culture differential in parental autonomy' (2008) 41 *University of California, Davis Law Review* 1773, 1786.

³ SM Davis, ES Scott, W Wadlington and CH Whitehead *Children in the legal system: Cases and materials* 3 ed (2004) 2, observing that 'in the early years of the twentieth century . . . the idea that the state has a responsibility for the welfare of children, and that society has an interest in how children are reared, emerged and became widely accepted'.

⁴ See PA Schene 'Past, present, and future roles of child protective services' (1998) 8 *Future of Child* 23, 25, stating that '[t]he doctrine known as *parens patriae*. . . was viewed as a justification for governmental intervention into the parent-child relationship. . . . Children of the 'unworthy poor' were saved . . . by separation from their parents

autonomy in the upbringing of children. The second paradigm casts the child as an end in him or herself, an individual with rights that limit the reach of parental responsibility. This portrays the state as a potential arbiter in conflicts between grown-up children claiming the right to make independent decisions and parents seeking to assert their rights to make decisions about child-rearing. Alternatively, both parents and the state may assert their authority to make decisions for the child, especially the very young or those who have not reached the minimum age of consent. This is because while children are full persons with desires and life plans, their lack of capacity and legal status justify the suppression of their choices by responsible adults.⁵

For a theory of children's rights to explain adequately the nature of the parent-child relationship, it should appropriately balance child participation (a measured version of the child's claim to autonomy), parental rights (autonomy rights claimed against others or the state and rights to make decisions for the child) and state intervention. Against this background, this chapter traces the historical and philosophical evolution of the parent-child relationship. It identifies five theoretical models and interrogates the extent to which each model balances parental rights, child participation and state intervention. These models include the property theory; the fiduciary model; paternalism, the interest theory and sociological theory. Each of these theories has justifications for why children should or should not have certain rights and what role parents or the state should play in promoting children's rights.

Below is an analysis of the historical and philosophical development of each of the theories mentioned above; their scope and further development; and a critical appraisal of their implications for the triadic relationship between the child, the parent and the state. In discussing these theories, the main aim is to investigate the extent to which each theory adequately explains parent-child relations and therefore provides an appropriate framework through which to resolve potential conflicts (between children, parents and the state) in decision-making. Thus, the four models provide the theoretical framework through which Parliament's approach to medical and reproductive decision-making may be understood.

through indenture or placement in institutions. Actions taken on behalf of [neglected or abused] children were typically justified on moral grounds, but they also served as potent instruments of social control'.

⁵ JL Dolgin 'The fate of childhood: Legal models of children and the parent-child relationship' (1997) 61 *Albany Law Review* 345, 382.

2 THE PROPERTY THEORY

2.1 Definition and justification

The property theory depicts children simply as the property of their parents. It portrays children as the product of the reproductive capacity of their parents and as commodities to be exploited at their producers' whims. In terms of the 'proprietary' view, biological parents own their children based on the child's production by them. Aristotle for instance referred to children as belonging to their biological parents: 'for the product belongs to the producer (e.g. a tooth or hair or anything else to him whose it is)'.⁶ Archard develops this thesis and argues that 'Aristotle's examples suggest something more than the relation of producer to product, namely that of part to whole'.⁷ The main claim is that given that 'genetic parents own the genetic material from which the child is constituted, they have a *prima facie* claim to the child'.⁸ Genetic accounts construe parent-child relations as property relations, by deriving 'claims about parenthood from premises involving claims about ownership'.⁹ Thus, the biological fact of parentage largely grounds parental claims to ownership of children.

Other scholars such as Hobbes argue that children's 'object' status arises from parental power and the child's implicit consent to be governed by it.¹⁰ For Hobbes, the child is 'in most absolute subjection' to the parent, as the slave is to the master. In essence, the parent possesses the power to 'alienate, that is, assign his or her dominion, by selling, or giving them in adoption or servitude to others; or [to] pawn them for hostages, kill them for rebellion, or sacrifice them for peace, by the law of nature, when [the guardian's] conscience think it to be necessary'.¹¹ Hobbes explains that the parental right to command and the child's obligation to obey are rooted in the

⁶ Aristotle *Nicomachean Ethics*, translated by W. D. Ross, revised by JO Urmson (1975) Book VIII.12, 20–25.

⁷ D Archard *Children: Rights and childhood* (2004) 142.

⁸ E Brake and J Millum 'Parenthood and Procreation' in *The Stanford Encyclopedia of Philosophy* (Spring 2012), Edward N. Zalta (ed) available at <http://plato.stanford.edu/archives/spr2012/entries/parenthood/> (accessed 10 May 2013) para 4.1.

⁹ Ibid.

¹⁰ See T Hobbes *De Cive* H Warrender (ed) (1588-1679) (1983) Chapter 9, para 8, stating that while the parent can emancipate the child, such actions merely loosen parental authority, but do not liberate the child.

¹¹ T Hobbes *The Elements of Law* (1640) Chapter 23, para 8.

deep inequality of power between children and adults. In *The Elements of Law*, he states that parental ‘dominion over a child’ arises from the power parents, especially the mother, have ‘to save or destroy’ the child.¹² Power confers right.

Hobbes clarifies this standpoint by arguing that ‘he that hath ...gotten into his power any other that either by *infancy or weakness* is unable to resist him, by right of nature may take the best caution that such infant...can give him of being ruled by him for the time to come...Out of which may be collected that irresistible might...is right’.¹³ Might, ‘irresistible by factual gross inequality’, makes ‘right’ without any need for social contract. He proceeds to argue that parental dominion is rooted in the child’s consent. According to him, dominion over another can be obtained by generation or by conquest¹⁴ and parents have dominion over children by generation.¹⁵ Thus, ‘the right of dominion by generation which a parent has over his children...is derived...from the child’s consent, *either express or by other sufficient arguments declared*’.¹⁶ However, the consent to which he refers does not seem to be real as Hobbes himself argues that children lack the mental competence to be part of a social contract.¹⁷ The propriety of these justifications for treating children as ‘property’ is explored below.

2.2 Historical origin and gradual development

Contemporary legal philosophers have traced the origin of the property theory to Aristotle,¹⁸ but there is evidence that children were treated as property way before Aristotle’s times. Based on the principle that he who gave had also the power of taking away, ancient Roman law granted the

¹² Ibid, Chapter 23, para 3.

¹³ Ibid, Chapter 14, para 13.

¹⁴ S Moller Okin *Women in Western political thought* (1979) 198, arguing that while the mother is sovereign at birth, this sovereignty later disappears from the picture, and Hobbes ‘proceeds to present the family as a strictly and solely patriarchal institution’.

¹⁵ For a comprehensive discussion of Hobbes’ views, see JP Sommerville *Thomas Hobbes: Political ideas in historical context* (1992) and C Pateman *The sexual contract* (1988).

¹⁶ T Hobbes *The Leviathan* JCA Gaskin (ed) (1588-1679) (1998) Chapter 2, para 20.

¹⁷ At Chapter 26 para 8, he argues that ‘[o]ver natural fools, children, or mad-men there is no Law, no more than over brute beasts; nor are they capable of the title of just, or unjust; *because they had never power to make any covenant, or to understand the consequences thereof*’. See also P King ‘Thomas Hobbes’ children’ in SM Turner and GB Matthews (eds) *The philosopher’s child: Critical perspectives* (1998) 65, 81-82.

¹⁸ D Archard and C Collins ‘Introduction’ in D Archard and CM Collins (eds) *The moral and political status of children* (2002) 1, 1.

father the power, including the power of life and death,¹⁹ over all his descendants regardless of the descendant's age or social standing.²⁰ Under ancient Roman law, the eldest living male ancestor of each family was a *paterfamilias* (head of the household) who had in his power (*potestas*) all descendants traced through the male line.²¹ The *paterfamilias* was legally independent and could not be in anyone's power; whether or not they were over or below the age of majority.²² In about 450 B.C., the Romans codified the laws of the 12 tables. These laws permitted the father to put to death a monstrous or deformed offspring and to imprison or scourge the child, to keep him working in the fields in chains or put him to death, even if the son held the highest public office.²³ There was hardly any legal duty to justify the way one exercised parental power.²⁴ Given that children were regarded as the 'property' of the *paterfamilias*, the latter could recover the child through a vindication and sue for damages if the child was kidnapped by another. More importantly, the aggregation of the interests of children into those of the *paterfamilias* meant that the latter was the sole representative of the family vested with *locus standi* in the tribunals of the state and entitled to sue for personal damages if any of his children (*patria potestas*) were violated or injured.²⁵ Nonetheless, the powers of the *paterfamilias* were gradually substantially reduced.²⁶

In ancient Greece, childhood ended when a person reached puberty and before then, the child remained on the margins of society. Whilst boys attained puberty at the age of 18 years, girls were never permitted to achieve puberty, but their status changed from that of pupil to teacher of their children when they became old enough to marry.²⁷ Being born into an Athenian household did not guarantee the child membership of the family. After the birth of a child, the father had the final authority to decide whether the child was to be kept alive or to be killed.²⁸ In the event that

¹⁹ R Yaron 'Vitae Necisque Potestas' (1962) 30 *TR* 243-61.

²⁰ See Gaius *Institutes*, book 1, D.1.6.3 and J Zablocki 'The image of a Roman family in Noctes Atticae by Aulus Gellius' (1996) 2 *Pomoerivm* 1, 2.

²¹ A Borkowski and P Du Plessis *Textbook on Roman law* 3 ed (2005) 113.

²² See Ulpian *Institutes*, Book 1 D.1.6.4 and Ulpian *Edict*, Book 46, D.50.1619 5.2.

²³ See Table IV of the Law of the Twelve Tables.

²⁴ See S Bok 'Lying to children' (1978) 8(3) *Hastings Centre Report* 10.

²⁵ See WA Hunter *Introduction to Roman law* (1955) 30-35.

²⁶ See Marcian *Institutes*, Book 14 and Ulpian *Adulterers*, Book 1, D.48.8.2.

²⁷ J Henderson 'Children in antiquity' 1, available at https://www.google.co.za/?gws_rd=cr&ei=zvl4UuyYO8nZtAaR2ICIAg#q=Henderson+%E2%80%98Children+in+antiquity%E2%80%99+ (accessed 5 November 2013).

²⁸ M Golden *Childhood in classical Athens* (1990) 5.

the father did not accept the child into the family, the child was abandoned in an act referred to as exposure or *egxutristriai*. Scholars have revealed, through archeological evidence, instances of the exposure of children in ancient Greece as excavated remains of children have been found in pots thrown down well-shafts.²⁹

Greek philosopher Plato preferred to keep a sharp divide between childhood and adulthood on the basis that adult matters would influence negatively children's understanding of God and the world.³⁰ He talked about 'the possession and use of women and children' and referred to men as having to act as 'guardians and watchdogs of the *herd*' of women and children.³¹ In *The Republic*, he observes that while all children are full of passion 'almost as soon as they are born, some of them *never* seem to attain to the use of reason, and most of them *late enough*'.³² He underlined the need to protect children as he certainly did not think that children could perfectly do things adults were capable of doing. Similarly, Aristotle compares a man's sovereignty over his chattels to that of the father over his children.³³ He observes that a child 'until it reaches a certain age and sets up for itself' is 'as it were part of himself', that is the parent.³⁴ In other works, Aristotle insists that parental rule over children is 'kingly' because 'the begetter is the ruler by reason of love and age'.³⁵ Children have the 'rational' powers of '*deliberation only imperfectly*' and 'since a child is not mature, it is clear that his virtue belongs to him in relation to his end and his tutor, not in relation to himself'.³⁶ Commenting on this part of Aristotle's *Politics*, Aquinas observes that the author meant that 'since the child is not mature, his virtue is not in relation to himself (i.e. not ruled by his own understanding) but disposed as suitable for his

²⁹ H Bolkestein 'The exposure of children at Athens and the *egxutristriai*' (1922) 17(3) *Classical Philology* 222, 222.

³⁰ See Plato *The Republic* (360 BC) J Manis (ed) (1998-2013) 65-68.

³¹ Ibid, 134 and 136.

³² Ibid, 127.

³³ Archard and Collins (note 18 above) 1.

³⁴ Aristotle *Nicomachean Ethics*, WD Ross (trans) revised by JO Urmson, in *The complete works of Aristotle*, Jonathan Barnes (ed) (1984) 5. 6. 1134.

³⁵ Aristotle *Politics* Book 1 B Jowett (trans) (350BC) Chapter XII.

³⁶ Ibid.

proper end and obeying his teacher'.³⁷ While there is evidence that Aristotle did not strictly regard children as property,³⁸ he saw children as an extension of their parents.

The property theory also took its hold on English law and philosophy until the 18th Century³⁹ and, it is arguable, that there are still remnants of this theory in modern day societies. Blackstone wrote little about children's rights, emphasising instead the duties of honour and obedience owed by children to their fathers.⁴⁰ Parents and families had considerable rights and control over their children, including the power to sell a child in cases of necessity.⁴¹ According to Filmer, human beings are not born free, as social contract theory supposed, rather they are born into a pre-ordained subject status: for men, subjection to the monarch and for women, subjection to the monarch, the father and the husband.⁴² His version of the property theory was firmly based on the Bible⁴³ and influenced by some of his predecessors who had argued that a king was truly *parens patriae*, the political father of his people.⁴⁴ According to him, the father had the power to rule absolutely and no duty to account to anyone for his actions.⁴⁵

Whereas the language of human rights suggests that it is now totally inappropriate to see children as property, the reality is that the world is still rich with practices which demonstrate that many parents still think that they own their children. In this respect, Vaughn once posited that '[t]here

³⁷ T Aquinas *Commentary on Aristotle's Politics* RJ Reagan (trans) (2007) 72-74.

³⁸ In *Politics*, Chapter XII, he observes that 'it is clear that the care of the household concerns human beings more than material property, the virtue of human beings more than the possessions we call wealth, and *free persons more than slaves*'.

³⁹ I Pinchbeck and M Hewitt *Children in English society* Vol II (1973) 348, describe children 'as the property of their parents', as 'being used by them' and as 'personal or family assets...among the poor the labour of children was exploited; among the rich their marriages were contrived; all to the economic and social advantage of the parents'.

⁴⁰ W Blackstone *Commentaries on the laws of England* Vol 1, 12 ed (1700-1795).

⁴¹ See F Pollock and FW Maitland *A history of English law before the time of Edward I*, 2 ed (1898).

⁴² See generally R Filmer *The anarchy of a limited or mixed monarchy* (1648); *The freeholder's inquest* (1648) and *Observations upon Aristotle: Touching forms of government* (1652).

⁴³ See Exodus 20:9; 1 Samuel 8: 19-20; 1 Kings 3: 9; Colossians 3: 22; Colossians 3: 20; Titus 3: 1 and Matthew 21: 2-3. For a spirited attack on Filmer's theory, see MA Butler 'Early liberal roots of feminism: John Locke and the attack on patriarchy' (1978) 72(1) *The American Political Science Review* 135, 136-38 and H Barnett *Introduction to feminist jurisprudence* (1998) 58.

⁴⁴ See generally J Knox *First blast of the trumpet against the monstrous regiment of women* (1558); R Field *Of the church* (1608); J Maxwell *Sancta regus majestas or the sacred and royal prerogative of Christian Kings* (1644) and J Ussher *The power communicated by God to the Prince and the obedience required of the subject* (1644).

⁴⁵ R Filmer *Patriarcha and other political works of Sir Robert Filmer* P Laslett (ed) (1653) (1949) Chapter 20, paras 3-4. See also R Allestree *The whole duty of man* (1663) 291, stating that 'children are so much the goods, the possessions of their parent, that they cannot, without a kind of theft, give away themselves without the allowance of those that have the right in them'.

are places in the world today where children are regarded more or less as property, and the results are not pretty. In some places parents do sell children, and especially daughters, into slavery, or otherwise exploit them for the parents' advantage'.⁴⁶ In every society, there are remnants of ancient philosophies and the concept of the child as property still remains, usually in the form of strong protection of parental rights. To support this view, some scholars have demonstrated that the rise of modernity and the demand for skilled labour have perpetuated children's social and economic dependence on adults as children now spend more time in training institutions than ever before. According to Ncube, modern-day parents invest more time and resources towards the child's intellectual development and this tends to translate into an 'aggressive assertion of parental authority over children'.⁴⁷ In the African context, it has been argued that practices such as communitarianism;⁴⁸ the emphasis on respect for elders;⁴⁹ virginity testing;⁵⁰ child labour; forced marriages; the payment of bridewealth;⁵¹ the system of kinship

⁴⁶ KI Vaughn 'Who owns the children? Libertarianism, feminism and property' (1993) 18 *Reason Papers* 189, 191. See also M Kellmer-Pringle *The needs of children* 2 ed (1980) 156, observing that 'a baby completes a family, rather like a TV set or fridge...that a child belongs to his parents like their possessions over which they may exercise exclusive rights'.

⁴⁷ W Ncube 'The African cultural fingerprint? The changing concept of childhood' in W Ncube (ed) *Law, culture, tradition and children's rights in Eastern and Southern Africa* (1998) 11, 24.

⁴⁸ See R Howard 'Evaluating human rights in Africa: Some problems of implicit comparisons' (1984) 6 *Human Rights Quarterly* 160, 175, observing that '[c]onstant references to communal society mask systematic violations of human rights in the interest of ruling elites'; C Himonga 'The right of the child to participate in decision-making: A perspective from Zambia' in Ncube (note 47 above) 95, 117, arguing that communal decision-making renders the duty to hear the child less imperative; TW Bennett 'The best interests of the child in an African context' (2002) *Obiter* 145, 150, stressing that the aggregation of the interests of the child with those of the community denies the child the space to make rights-based claims against other members of the ethnic group; BA Rwezaura 'Changing community obligations to the elderly in contemporary Africa' 4(1) *Journal of Social Development in Africa* (1989) 5, 12-3; BA Rwezaura 'The duty to hear the child: A view from Tanzania' in Ncube (note 47 above) 57, 78-80; TN Nhlapo 'Culture and women abuse: Some South African starting points' (1992) *Agenda* 5; A Armstrong, M Chuulu, C Himonga, P Letuka, K Mokobi, W Ncube, T Nhlapo, B Rwezaura and P Vilakazi 'Towards a cultural understanding of the interplay between children's and women's rights: An Eastern and Southern African perspective' (1995) 3 *International Journal of Children's Rights* 333, 337; J Donnelly *Universal human rights in theory and practice* (1989); G Hyden 'The challenges of domesticating rights in Africa' in R Cohen, G Hyden and WP Nagan (eds) *Human rights and governance in Africa* (1993) 256; A Armstrong *A child belongs to everyone: Law, family and the construction of the best interests in Zimbabwe* (Innocenti Occasional Papers, Child Rights Series, Number 11, 1995) 5; P Jones 'Group rights and group oppression' (1999) 7(4) *Journal of Political Philosophy* 353-77; and C Bentley *Whose right it is anyway? Equality, culture and conflicts of rights in South Africa* (Human Sciences Research Council; Democracy and Governance Research Programme; Occasional Paper Number 4; 2003).

⁴⁹ J May *Changing family changing laws* (1987) 16; MJ Ruel *The social organisation of the Kuria* (Fieldwork Report, University of Nairobi Library, 1958) 101-02; P Rigby *Cattle and kinship among the Gogo: A semi-pastoral society of central Tanzania* (1969) 220; and D Pellow *Women in Accra: Options for autonomy* (1977) 56, rightly arguing that 'respect for one's elders, when carried to an extreme, rules out any chance of exercising free will'.

⁵⁰ See generally L Vincent 'Virginity testing in South Africa: Re-traditioning the post-colony' (2006) 8(1) *Culture, Health and Sexuality* 17-30; ER George 'Virginity testing and South Africa's HIV/AIDS crisis: Beyond rights universalism and cultural relativism toward health capabilities' (2008) 96 *California Law Review* 1447-1519 and F

obligations⁵² and traditional religion⁵³ tend to portray children as the property of their parents and family group. However, some leading scholars⁵⁴ and top courts⁵⁵ have refuted, quite strongly, the argument that these practices support the portrayal of children as property and the debate still hangs in the balance. Even as the debate rages on, some authorities regard it as a

Scourgie 'Virginity testing and the politics of sexual responsibility: Implications for AIDS intervention' (2001) 61(1) *African Studies* 55-75.

⁵¹ Under customary law, the payment of bride wealth transfers the bride's reproductive capacity from her family to that of the husband and therefore children belong (in the sense of being owned) to the paternal family. This principle is embodied in the saying that 'cattle beget children'. See *Madyibi v Nguva* 1944 NAC (C&O) 36; M Gluckman 'Kinship among the Lozi of Northern Rhodesia and the Zulu of Natal' in AR Radcliffe-Brown and P Forde (eds) *African systems of kinship and marriage* (1962) 166, 184; DS Koyana, L Mwambene and JC Bekker *Customary marriage systems in Malawi and South Africa*, 1 ed (2007) 38; A Fick, HM Bosman-Swanepoel and NA Strydom *Custody and visitation disputes: A practical guide* (1998) 48-49; M Gluckman 'Kinship and marriage among the Lozi of Northern Rhodesia and the Zulu of Natal' in Radcliffe-Brown and Forde AR Radcliffe-Brown and P Forde (eds) *African systems of kinship and marriage* (1962) 166, 184; TW Bennett *Customary law in South Africa* (2004) 285; JC Bekker *Seymour's customary law in Southern Africa, Fifth Edition* (1989) 195-96; JF Holleman *Issues in African law* (1974) 91; AR Redcliffe-Brown 'Introduction' in AR Radcliffe-Brown and P Forde (eds) *African systems of kinship and marriage* (1962) 1, 50, stating that 'the rights of the father and his kin over the children of the marriage are so preponderant as to be nearly absolute and exclude any rights on the part of the mother's kin'; BA Rwezaura *Traditional family law and change in Tanzania* (1985) 95-99; CRM Dlamini 'The need for social research in the social sciences for family law in respect of blacks' in AF Steyn, HG Strijdom, S Viljoen and FG Bosman (eds) *Marriage and family life in South Africa: research priorities* (1987) 636, 649; HF Child *Compendium of native case law of the colony of Southern Rhodesia, Second Edition* (1960) 11; H Cory and MM Hartnoll *Customary law of the Haya tribe, Tanganyika Territory* (1945) para 91; and BA Rwezaura 'The concept of the child's best interests in the changing economic and social context of Sub-Saharan Africa' (1994) 8 *International Journal of Law and the Family* 82, 86-87, positing that the transfer of a woman's reproductive capacities to another family made all her children the 'property' of the paternal family.

⁵² See H Kuper 'Kinship among the Swazi' Radcliffe-Brown and Forde (note 51 above) *African systems of kinship and marriage* (1962) 96.

⁵³ C Oppong *Growing up in Dagbon* (1973) 38, argues that the belief that disobedience attracts the wrath of the ancestral spirits forces children to comply with oppressive cultural practices; and E Goody *Context of kinship: An essay in the family sociology of the Gonja of Northern Ghana* (1973) 173, stating that '[traditionally], it is thought that either parent can bring illness and misfortune to a wilfully disobedient child, both while living and after death. This retribution needs not be intentional, for if a man's ancestors hear him complaining, even to himself, that his children are not fulfilling their filial obligations, his anger may lead them to retaliate without his consciously willing this to happen'.

⁵⁴ J Sloth-Nielsen and BD Mezmur 'A dutiful child: The implications of article 31 of the African Children's Charter (2008) 52(2) *Journal of African Law* 159, explaining most of these practices in a way that justifies their continuation; R Cohen 'Endless teardrops: Prolegomena to the study of human rights in Africa' in Cohen, Hyden and Nagan (note 48 above) 1, 14; P Alston 'The best interests principle: Towards a reconciliation of culture and human rights' in P Alston (ed) *The best interests of the child: Reconciling culture and human rights* (1994) 1-25; A An-Na'im 'Cultural transformation and normative consensus on the best interests of the child' in P Alston (ed) *The best interests of the child: Reconciling culture and human rights* (1994) 62-81; and T Fernyhough 'Human Rights and pre-colonial Africa' in AA An-Na'im and FM Deng (eds) *Human rights in Africa: Cross-cultural perspectives* (1990) 39, 49.

⁵⁵ Defending communitarianism and group solidarity, the South African Constitutional Court, in *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) para 53, held:

The notion that we are not islands unto ourselves is central to the understanding of the individual in African thought. This is often expressed in the phrase *umuntu ngumuntu ngabantu* [a person is person because of others] which emphasises ... the interdependence of the members of the community and [the fact] that every individual is an extension of others.

given that African ‘children are often regarded as inferior and as property’.⁵⁶ On the whole, it is important to note, as Stone observes, that popular attitudes about children have changed with ‘glacial slowness’⁵⁷ and images of children as ‘property’ persist to this day. This is not to say that children should be treated as property, but to observe that whilst there is a wealth of rhetoric about children as agents, this rhetoric confronts the reality of children’s ‘object’ status, particularly in tribal communities where the idea of cultural rights and gender/age-based roles are prevalent. Today, there are traces of the property theory in social practices that undermine the inherent dignity of children and it is arguable that the treatment of children as ‘objects’ is now more subtle and difficult to detect than ever before.

2.3 Critical appraisal

One of the enduring charges against the proprietorial account of parent-child relations is that it views children as objects, not as human beings who have individual identities. The property theory portrays children as mere objects with no rights, desires and aspirations. Children are taken not as ends in themselves, but as means to their parents’ ends. In essence, the property theory is an account of complete parental rights over children and it negates the fact that as children grow up, they develop their own life plans. Part of the problem is that the theory constructs children not as separate individuals, but as extensions of their parents. Therefore, it is imperative to disaggregate the rights of children from those of their parents. This point is illustrated by Korsgaard when she notes that to be a citizen with others in the ‘Kingdom of Ends’

⁵⁶ A Lloyd ‘A theoretical analysis of the reality of children’s rights in Africa: An introduction to the African Charter on the Rights and Welfare of the child’ (2002) 2 *African Human Rights Law Journal* 11, 24. See also B Thompson ‘Africa’s Charter on Children’s Rights: A normative break with cultural traditionalism’ (1992) 41(2) *International Comparative Law Quarterly* 432; 438-39; KCJM Arts ‘The international protection of children’s rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the Child’ (1993) 5 *African Journal of International and Comparative Law* 139, 158; observing that ‘[t]he doctrine of parental authority over children is strongly present in contemporary Africa and children are often regarded as the property of their parents or legal guardians’ and GS Kamchedzera ‘The rights of the child in Malawi: An agenda for research on the impact of the United Nations Convention in a poor country’ (1991) 5(3) *International Journal of Law, Policy and the Family* 241, 246, arguing as follows:

Children should not be regarded as property. Traditionally, this has been the case. In most areas the economic value of bride betrothals varied according to the beauty, education and social status of the girl. Elsewhere, concepts of parental “rights” have been replaced by the notion of parental responsibility. But in Malawi the child either belongs to the father’s side or the mother’s side according to tradition.

⁵⁷ L Stone *The family, sex and marriage in England 1500-1800* (1977) 191.

is to be treated not as a means to an end, but as an end in itself, with desires and inclinations, personal choices and cherished goals.⁵⁸

Under the property theory of rights, decision-making of all sorts is the exclusive preserve of the caretaking adult. Part of the reason is that strictly speaking, property cannot logically bear rights and the owner of the property is generally entitled to use their property as they deem fit. Therefore, children as property may not assert any meaningful rights against parents and the state.⁵⁹ In the context of child participation, it is important to note that property is not consulted when decisions concerning its sale, disposal, abandonment and destruction are made. Thus, the need to consult with a person defined as property does not arise and children have no right to participate in matters affecting them. In fact, since property is no more than the monetary or other interest of the owner in a particular object, the object itself cannot logically make claims on its own behalf and certainly not against its owner. Thus, the rights of the child remain aggregated with those of the parent and, strictly speaking, the child's rights cannot logically be in conflict with those of the parents since they are an extension of parental rights.

Property ownership comes with a bundle of rights for the owner to exclude others from either using the property or benefiting from its use. Having property is socially and economically important,⁶⁰ and property owners generally protect their property from risks such as fire, damage and theft. The child as property is assured parental protection not as a bearer of rights, but as a valuable commodity for ensuring the achievement of the owner's economic or other goals. Thus, even where the child receives parental protection from external harm, such protection is a matter of charity, not right. Under the property theory, parents bear no positive obligation to exercise reasonable care and due diligence in the way they supervise children or task them to perform particular duties. They have no duty to act in ways that enhance their child's welfare.

⁵⁸ See CM Korsgaard *Creating the kingdom of ends* (1996), especially at 188-224. See also BB Woodhouse 'Who Owns the Child? Meyer and Pierce and the child as property' 33 *William and Mary Law Review* (1992) 995, 1122, arguing that 'children own themselves. Neither the state nor the parent owns them, although each must genuinely love them and take responsibility for their future'.

⁵⁹ See generally BB Woodhouse 'From property to personhood: A child-centred perspective on parents' rights' (1997-1998) *Georgetown Journal on Fighting Poverty* 313.

⁶⁰ MJ Radin 'Property and Personhood' (1982) 34 *Stanford Law Review* 957, 978-79 and KR Minogue 'The concept of property and its significance' in JR Pennock and JW Chapman (eds) *Property: Nomos XXII* (1980) 3.

More importantly, society in general and the state in particular bear no obligation to rescue the child from, for instance, the most horrible forms of abuse, exploitation and degradation as the child is not a holder of rights. The state's role is essentially negative and state agencies may not intervene to promote or defend the child's welfare. According to Chirwa, the property theory ensured that 'children were beholden to the whims of their parents who were not even bound to act in their children's best interests'.⁶¹ On the whole, the property theory promotes the concept of parental autonomy and the state's non-interventionistic approach to domestic relations between parents and children. It creates severe deference to the legitimate veto authority of parents and it fails to recognise that the child's rights and interests usually exist independently of the desires and views of parents.⁶² The exclusion of the state and others from the family and upbringing of the child means that parents or guardians alone determine the child's best interests without the need to justify their actions.

Further, the theoretical justifications for treating children as property are erroneous. First, the emergence of modern reproductive technologies has broken down the traditional bonds between biological parents and their children. Inventions in reproductive technologies are dissecting the historical ties between biological parenthood, gestation and child-rearing. As Sullivan observes, 'baby making of all sorts, including the hi-tech and clinical kind, has increasingly occurred outside heterosexual marriage'.⁶³ Not only can a woman become pregnant without sexual intercourse with a man, but man can also have children without any relationship with their mothers. As one scholar has pointed out, '[i]t is no longer possible to rely on old legal assumptions that genetic parenthood is congruent with birth or the fact that a man is married to or in a relationship with a birth mother'.⁶⁴ For instance, a lesbian couple can now decide to request for a sperm and an egg from anonymous donors. They can then arrange for one of them to carry the pregnancy to term or for a surrogate mother to do so on their behalf. Further, the property theory does not explain why relatives; adoptive parents; and foster carers should exercise parental guidance in respect of children who are not biologically their own. Genetic

⁶¹ D Chirwa 'Children's rights' in D Chirwa *Human rights under the Malawian Constitution* (2011) 193, 194.

⁶² KN Maillard 'Rethinking children as property: The transitive family' (2010) 32(1) *Cardozo Law Review* 101, 108.

⁶³ M Sullivan, *The family of woman: Lesbian mothers, the children and the undoing of gender* (2004) 1.

⁶⁴ SB Boyd 'Gendering legal parenthood: Bio-genetic ties, intentionality and responsibility' in *Windsor Yearbook of Access to Justice* (2007) 3. See also R Mykitiuk 'Beyond conception: Legal determinations of filiation in the context of reproductive technologies' (2001) 39 *Osgoode Hall Law Journal* 771, 782;

accounts of the property status of children collapse in these instances and parents have no basis for asserting rights over children.

Hobbes' argument that 'irresistible' power confers rights on parents adds nothing to the analysis of the child's 'object' status under the property theory. On the whole, it boils down to claiming that parents exercise coercive power because they have it and children cannot do anything about it. In all fairness, the parent's 'irresistible might' just explains the parent's power and the child's vulnerability, it does not explain why children should be treated as property which can be sold or destroyed. That children lack physical or political power is not an indication that adults who have it should use it to treat children as property. Focusing on the possession of power as a ground for treating others as 'property' is inconsistent with the need to justify its exercise, especially in modern democracies and families.

Finally, hypothetical consent does not justify the treatment of children as property.⁶⁵ Besides, children cannot give even tacit consent to cruel parental conduct. Young children lack the cognitive competences that would permit them to give consent – whether express or tacit. It is impossible for a young child to bind itself, legally or morally, without possessing the remotest idea of what is going on. Even in his later works, Hobbes deliberately avoids the unanswered question of how young children can be held to have consented to coercive parental control when they were not yet aware of it.⁶⁶ Assuming that children may be held to have retrospectively consented to being treated as property in other less dangerous contexts, it is not clear how an adult may be taken to have granted future-oriented consent to being killed or sold (traditional property theorists confer on parents the power of life and death) when they were young.

⁶⁵ For a fuller discussion of this point, King (note 17 above) 81-82.

⁶⁶ W Molesworth (ed) T Hobbes *The English Works of Thomas Hobbes* Vol 5 (2004) 180.

3 THE FIDUCIARY MODEL OF CHILDREN'S RIGHTS

3.1 Meaning and justification

Fiduciary relations involve the subjection of one person to the continuous managerial power of another, such as is found in the trustee-beneficiary relationship. In terms of the fiduciary model, the relationship between a parent and a child is that of trust, not absolute authority. A trust is an arrangement made for a particular purpose whereby the owner of property, the truster, vests the rights of its administration in another, the trustee. In the context of the parent-child relationship, parents as trustees of the child as future adult act to promote the interests of the child until such time as the child is able to do so for him- or herself. Noggle observes that '[t]he parent-child relationship does bear a strong formal resemblance to the fiduciary relationship. For in both cases we have a principal and an agent, and the agent is charged with protecting the rights and promoting the interests of the principal'.⁶⁷ The child-principal relies on the parent-agent's capacity and the latter makes decisions which the former is not ordinarily able to make because of lack of maturity. The purpose of the trust is to safeguard the future interests of the truster (the child as hypothetical adult) which the child is unable to do at the moment.⁶⁸ The fiduciary model recognises that children, being irrational and immature, cannot be entrusted with decisions which have long term implications for their future.⁶⁹ Thus, children's lack of capacity justifies the parent's exercise of fiduciary responsibilities.

⁶⁷ R Noggle 'Special agents: Children's autonomy and parental authority' in Archard and Macleod (note 18 above) 97, 98.

⁶⁸ See CK Beck, G Glavis, SA Glover, MB Jenkins and RA Nardi 'The rights of children: A trust model' (1978) 46(4) *Fordham Law Review* 669-780.

⁶⁹ J Locke *Two treatises of government* P Laslett (ed) (1988) (1690) (hereafter *First or Second Treatise*). See *Second Treatise*, paras 58, 61 and 63, stating as follows:

The Power that Parents have over their Children arises from that duty which is incumbent on them to take care of their Offspring during the imperfect state of Childhood. [When the child] has not Understanding of his own to direct his Will, he is not to have any Will of his own to follow: He that *understands* for him must *will* for him too.... Thus we are *born Free* as we are born Rational, not that we have actually the Exercise of either: *Age that brings one, brings with it the other too. And thus we see how natural Freedom and Subjection to Parents may consist together, and are both founded on the same Principle.* The freedom then of Man and Liberty of acting according to his own Will, is grounded on his having Reason, which is able to instruct him in that Law he is to govern himself by, and make him know how far he is left to the freedom of his own will. To turn him loose to an unrestrained Liberty is to *thrust him out amongst Brutes* and abandon him to a state as wretched as theirs. This is that which puts the Authority into the Parents hands to govern the Minority of their Children.

For Kant, fiduciary relations between parent and child arise from the responsibility that attaches to the parents' decision to bring a helpless child into the world without her consent. More importantly, Kant recognises that 'parents cannot regard their child as a thing of their own making, for a being endowed with freedom cannot be so regarded. Nor, consequently, have they a right to destroy it as if it were their own property, or even to leave it to chance; because they have brought a being into the world who becomes in fact a citizen of the world'.⁷⁰ Unlike the property theory, the fiduciary model recognises the separate personhood of the child. Children have, by virtue of their parents' decision to procreate, an 'innate (not acquired) right to the care of their parents until they are able to look after themselves' and this right arises naturally by virtue of operation of the law (*lege*).⁷¹

In Kantian language, legal rights are either 'acquired' or 'innate'. An 'innate' right 'is that which belongs to everyone by nature, independently of any act that would establish a right'.⁷² Under the Kantian version of the fiduciary model, children's 'innate' right to be cared for imposes on parents the obligation to administer the child's trust diligently in a manner expected of responsible fiduciaries who have brought a helpless person into the world without her consent. The act of procreation connects the child's innate right to the parents' duty. Therefore, the child's vulnerability and 'innate' right to be treated as a person endowed with dignity and rights prevents the fiduciary from unilaterally setting the terms of his or her relationship with the child.⁷³ This version of the fiduciary model portrays the child as a holder of rights that are so compelling as to impose obligations on others.

⁷⁰ I Kant 'Rights of the family as a domestic Society: Title Second, Parental right (parent and Child)' in W Hastie (trans) *The philosophy of law: An exposition of the fundamental principles of jurisprudence as the science of right* (1887) 114-15, para 28.

⁷¹ I Kant *The metaphysics of morals* M Gregor (trans) (1797) (1991) 98-99.

⁷² *Ibid*, 63.

⁷³ Expanding on Kant, E Fox-Decent and EJ Criddle 'The fiduciary constitution of human rights' (2009) 15 *Legal Theory* 301, 313, reason as follows:

When parents unilaterally create a person who cannot survive without their support, the child's innate moral capacity to place the parents under obligation is triggered to ensure the child's security. The parents' freedom to procreate can thus coexist with the child's right to security from the perils of a condition to which she never consented. The child is treated as a person worthy of respect and not as a thing the parents can destroy or abandon. *As persons, children cannot be treated as mere means or objects of their parents' freedom to procreate. Rather, they are beings who, by virtue of their moral personhood, have dignity, and dignity proscribes regarding them as if they were things. The fiduciary principle renders the beneficiary's*

3.2 Historical origins and gradual development

Historically, the property theory became diluted as notions of authority began to be explained in terms of fiduciary duties owed by parents to their offspring. Origins of the fiduciary model can be found in the writings of Locke. He insisted that God owned children and gave them to parents in trust. As such, parents could not do as they pleased with their children.⁷⁴ Although he was a firm defender of the labour theory of property, Locke did not ground parental jurisdiction over children on parents' abilities and decision to procreate.⁷⁵ The creation of a natural person was a mystery to everyone except God and could therefore not establish claims of ownership of children.⁷⁶ Locke proposed a model in terms of which parents would hold the rights of the child in trust and many scholars have since explained the parent-child relationship in terms of this model, with or without modifications.⁷⁷ The modern version of the fiduciary model has removed God from the equation and portrayed the role of the parent as a representative one in terms of which the parent occupies the position of a trustee of the adult into whom the child will grow.⁷⁸

In terms of the fiduciary model, parental guidance is grounded on the child's lack of capacity to act in their own best interests. However, parental control is temporary and should not only be relaxed as the child's 'age and reason' increase,⁷⁹ but gradually be abandoned to 'leave man at his own free disposal'.⁸⁰ In its Lockean form, the fiduciary model requires that the parent's

entrusted interests immune to the fiduciary's appropriation, because those interests are treated as inviolate embodiments of the beneficiary's dignity as a person. In other words, the fiduciary principle authorizes the fiduciary to exercise power on the beneficiary's behalf but subject to strict limitations arising from the beneficiary's vulnerability to the fiduciary's power and his intrinsic worth as a person.

⁷⁴ *Two Treatises of Government*, 176-94 and 303-18.

⁷⁵ *First Treatise*, paras 50-72 and *Second Treatise*, para 56.

⁷⁶ *First Treatise*, para 27.

⁷⁷ See generally ES Scott and RE Scott 'Parents as fiduciaries' (1995) 81 *Virginia Law Review* 2401; KT Bartlett 'Re-expressing parenthood' (1988) 98 *Yale Law Journal* 293, 294; CJ Goetz and RE Scott *Principles of relational contracts* (1981) 67 *Virginia Law Review* 1089, 1126-130; RC Clark 'Agency costs versus fiduciary duties' in JW Pratt and RJ Zeckhauser (eds) *Principles and agents: The structure of business* (1985) 55; C Huntington 'Rights myopia in child welfare' (2006) 53 *University of California Los Angeles Law Review* 637, 654-55; and BB Woodhouse 'Hatching the egg: A child-centered perspective on parents' *Rights* (1993) 14 *Cardozo Law Review* 1747, describing parents as stewards bound to secure their children's welfare rights.

⁷⁸ M Freeman *Rights and wrongs of children* (1983) 49-50.

⁷⁹ *Second Treatise*, para 61, Locke avoids stating the exact age of discretion and simply observes that 'this is a great deal more easy for sense to discern, than for any one by skill and learning to determine'.

⁸⁰ *Second Treatise*, para 55, arguing as follows:

empire and dominion cease when the child reaches the ‘age of discretion’ or becomes capable of managing own affairs. Locke insisted that ‘Paternal or Parental Power is nothing, but that which Parents have over their Children, to govern them for the Children’s good, *till they come to the use of Reason*’.⁸¹ The exercise of parental control over the child ‘only prepare[s] him the better and sooner for [liberty]’.⁸² Therefore, the exercise of parental control was intended to prepare the child for rational autonomy, most likely when the child reaches adulthood. There is evidence to point out that Locke thought that the age of ‘reason’ or ‘discretion’ in many respects coincided with the legal age of majority.⁸³ Therefore, children appear to have claims to welfare rights until they reach the age at which national laws presume them to have attained capacity in various fields of activity.

To enable them to perform their duties effectively, the fiduciary model confers on parents wide discretion to make decisions without the undue interference of third parties. This is characteristic of all fiduciary relations ‘in which the satisfactory performance by the agent requires considerable discretion, but the principal, due to incapacity or other vulnerability, is not able to supervise or control that performance effectively’.⁸⁴ At the same time, fiduciaries are invariably subject to duties of allegiance (there is no room for self-dealing) and reasonable care (due diligence) in acting on behalf of their principals.⁸⁵ These responsibilities are an intrinsic part of

Children, I confess, are not born in this full state of equality, though they are born to it. Their parents have a sort of rule and jurisdiction over them, when they come into the world and for some time after; but it is a temporary one. The bonds of this subjection are like the swaddling clothes they are wrapt up in, and supported by, in the weakness of their infancy: age and reason as they grow up, loosen them, till at length they drop quite off, and leave a man at his own free disposal.

⁸¹ *Second Treatise*, para 170.

⁸² *Second Treatise*, para 61.

⁸³ At para 61 of the *Second Treatise*, Locke argues that ‘[a] capacity of knowing that law; which is supposed by that law, *at the age of one and twenty years*, and in some cases sooner. *If this made the father free, it shall make the son free too. Till then we see the law allows the son to have no will, but he is to be guided by the will of his father or guardian, who is to understand for him*’.

⁸⁴ ES Scott ‘Parental Autonomy and Children’s Welfare’ (2003) 11 *William & Mary Bill of Rights Journal* 1071, 1075.

⁸⁵ See generally N Bouwman ‘An appraisal of the modification of the director’s duty of care and skill’ (2009) 21(4) *SA Mercantile Law Journal* 509; MJ Loewenstein ‘The corporate director’s duty of oversight’ 27 *The Colorado Lawyer* (1998) 33; CM Bruner ‘Is the corporate director’s duty of care a fiduciary duty? Does it matter’ (2013) Washington and Lee Legal Studies Paper No 2013-14 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2237400 (accessed 8 November 2013); RD Glass 401(k) *Fiduciary Due Diligence: Often Overlooked Steps that Can Minimize the Likelihood of Litigation* (Investment Horizons, Inc, 2013) 2, available at <http://www.investmenthorizons.com/PapersOverlookedStepsForFiduciaries.pdf> (accessed 8 November 2013),

the principal-agent relationship and set up benchmarks against which the fiduciary's performance is to be measured. In the family context, duties of allegiance and reasonable care require parents to treat the child as a holder of rights, educating and nourishing the child, and preventing abuse. These duties are intended to remedy 'the defects' of the child's 'imperfect state' since the child, at birth and for some time thereafter, is 'weak and helpless, without knowledge or understanding'.⁸⁶

Scholars have referred to the child as borrowing the capacities of the parent. Noggle observes that '[f]iduciary relationships make possible an agent's borrowing the capacities of an expert in some particular endeavour...It seems natural, then, to think of the child as borrowing more widely from the capacities of the parent in order to compensate for the (many) capacities she needs but does not yet have'.⁸⁷ Some scholars have described this concept as hypothetical or future-oriented consent in the sense that the child does not strictly agree to the principal-agent relationship now, but the adult the child will become is taken to have consented retrospectively to the way in which parents as fiduciaries exercised their control over the child before the latter attained majority.⁸⁸ This idea is most forcefully explained by Locke interpreter Simmons. Simmons is of the view that the 'natural account of children's rights is one that is "forward-looking" — that is, one that somehow anticipates the child's future status as an autonomous rational agent capable of planning, self-control, and moral action'.⁸⁹ Parents should not only choose what the child would have chosen if competent to make the choice autonomously, but should also consider the interests of the adult the child will become.⁹⁰ The child's hypothetical image personifies his or her future interests and both the child and the parent bear obligations to the hypothetical adult behind the child.

observing that fiduciaries have the duty to act 'with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man [would exhibit] acting in like capacity and familiar with such matters'.

⁸⁶ *Second Treatise*, para 56.

⁸⁷ Noggle (note 67 above) 98.

⁸⁸ See R Dworkin *Taking rights seriously* (1977) 119, observing that parental interventions constitute a gamble 'by the parent on the child's subsequent recognition of the wisdom of restrictions. There is an emphasis on...what the child will come to welcome, rather than on what he does welcome'.

⁸⁹ AJ Simmons *The Lockean Theory of Rights* (1992) 202.

⁹⁰ See D Archard *Children: Rights and childhood* (1993) 53, stating that 'the caretaker chooses for the child in the person of the adult which the child is not yet but will eventually be'.

3.3 Critical appraisal

One of the advantages of the fiduciary model is that it recognises the importance of parental guidance in the exercise of rights by children. The fiduciary model recognises that the possession by children of the right to autonomy is potentially inconsistent with their development into adults who can lead meaningful lives and exercise autonomy properly. This point can be explained by making reference to Feinberg's classification of rights. Feinberg makes a distinction between rights that are common to adults and children (A-C rights); children's rights to the provision of basic instrumental goods of life such as food, shelter and protection (C-rights); children's anticipatory autonomy rights that resemble 'adult autonomy rights except that the child cannot very well exercise his free choice until later when he is more fully formed and capable' (C-rights-in-trust) and rights that belong to adults only (A-rights). Feinberg goes on to observe that A-rights include, among others, 'autonomy-rights (protected liberties of choice) that could hardly apply to small children'.⁹¹ Thus, he characterises child autonomy rights as anticipatory rights (C-rights-in-trust) which are usually limited by parents and the state in order to protect the child's interests in balanced growth and development. In the same way, the fiduciary model recognises that child autonomy rights can only be exercised fully when the child attains the age of majority as even older children may sometimes not know where their interests lie.

The main aim of fiduciary relations is to enhance the welfare of the principal at all costs, even at the cost of the invasion of the principal's autonomy. The reason behind this is that the main duty of the agent is to work for the good of his principal. To turn a child 'loose to an unrestrained liberty', argued Locke, 'is to *thrust him out amongst brutes* and abandon him to a state as wretched as theirs'.⁹² The dangers which may emanate from unrestrained liberty impose on parents the duty to control children and prevent them from harming themselves.⁹³ Children, argued Locke, are not born in a state of full equality because they cannot reason until age and

⁹¹ J Feinberg 'The child's right to an open future' in J Feinberg 'The child's right to an open future' in W Aiken and H LaFollette (eds) *Whose child? Children's rights, parental authority and State power* (1980) 124, 126-28 and 140-48.

⁹² *Second Treatise*, para 63.

⁹³ On welfare-based reasons for restricting autonomy, see J Fortin 'Children's rights and the use of physical force' (2001) 13 *Child and Family Law Quarterly* 243.

maturity liberate them from parental rule.⁹⁴ This means that if the child's immediately felt desires and preferences are mistaken and impulsive, such desires and preferences should not be satisfied. Sorens, along similar lines, observes that the fiduciary model 'holds children to be rights-bearers as hypothetical adults and to be subject to paternalistic oversight insofar as it advances their growth into adulthood. Children are therefore *distinct from property in that they have rights*, and they are *distinct from adults...in that they have welfare rights and are subject to paternalism*'.⁹⁵ These observations cast the fiduciary model as an improvement on the property theory in that it recognises the child as a separate person who nonetheless needs direction due to lack of capacity to make independent decisions in their own interests.

Another merit of the fiduciary model is that parents have no special autonomy rights under this model.⁹⁶ The model neither creates an impervious private family nor permits the abuse of parental autonomy. Fiduciary relations place on the agent the duty to act with due diligence in her performance of fiduciary functions and allow the state to intervene when the agent fails to meet the standard of care reasonably expected of someone occupying that position. The fiduciary model anticipates circumstances in which the state intervenes to supplement the agent's lack of the expertise required to safeguard the child's well-being.⁹⁷ Arguably, the possibility of state intervention acts as a check on the exercise of private parental power. This unmasks the oppression often caused by the public-private dichotomy.⁹⁸ Locke himself envisages a state in

⁹⁴ *Second Treatise*, para 55-57, 304-05. For criticisms of this approach, see S Burt 'The proper scope of parental authority: Why we don't owe children an open future' in S Macedo and IM Young (eds) *Nomos XLIV – Child, Family and State* (2003) 243, 251; and B Arneil 'Becoming versus Being: A critical analysis of the child in liberal theory' in Archard and Macleod (note 18 above) 70, 70-94.

⁹⁵ J Sorens 'Libertarian theory and children's rights: The fiduciary model, rationality, interests and the challenge of abortion' (Libertarian Alliance: Philosophical Notes No 61, 2001) 1.

⁹⁶ See for example A Tuckness 'Locke on education and the rights of parents' (2010) 36(5) *Oxford Review of Education* (2010) 627, 628 and D Foster 'Taming the father: John Locke's critique of patriarchal fatherhood' (1994) 56(4) *The Review of Politics* 641, 647, where the author argues that 'Locke does not deny that children will usually be cared for by their parents, but he does deny that parents possess any "peculiar right of nature" to rule them'.

⁹⁷ MS Oswald 'Parental rights, fiduciary duties and the child as a 'being of public concern', Paper presented at the Annual Conference of the Philosophy of Education Society of Great Britain, New College, Oxford (30 March – 1 April 2012) 10.

⁹⁸ See generally R Gavison 'Feminism and the public/private distinction' (1992) 45(1) *Stanford Law Review* 1-45; S Okin 'Gender, the public and the private' in D Held (ed) *Political theory today* (1991) 67-90; M Freeman 'Feminism and Child Law' in J Bridgeman and D Monk (eds) *Feminist Perspectives on Child Law* (2000) 19, 20; H Lim and J Roche 'Feminism and Children's Rights' in J Bridgeman and D Monk (eds) *Feminist perspectives on child law* (2000) 227, 229 and 247; F Olsen, 'Children's rights: Some feminist approaches to the United Nations Convention on the Rights of the Child' 6 *International Journal of Law and Family* 192, 194-95 and 208; M Minow 'Rights for the next generation: A feminist approach to children's rights' *Harvard Women's Law Journal* (1986) 1,

which parental ‘power so little belongs to the father by any peculiar right of nature, but only as he is guardian of his children, that when he quits his care of them, he loses his power over them’.⁹⁹ Given that agent-principal (parent-child) relations often arise in conditions in which the principal is unable to exercise the relevant power and is therefore vulnerable to the agent’s power,¹⁰⁰ state intervention is critical in restoring the balance once it is upset. It follows that parental rights are grounded on the satisfactory exercise of the duties of the office of parenthood. Parents, being ‘trustees’ of their children, can be removed from office if they fail to perform their duties adequately.¹⁰¹ Parents have to be guided by the child’s natural rights (to health, reasonable discipline, education and nourishment) and may ‘forfeit’ their rights by neglecting their duty to provide for their children.¹⁰²

However, apart from imposing duties of reasonable care and due diligence on the parents, the fiduciary model does not explain adequately the rights which children have against the state. Rights make it possible for children to make claims to particular benefits and without rights, persons have no legally enforceable claims against the state.¹⁰³ Even scholars, such as Kant, who refer to children’s ‘innate’ rights, these rights are only enforceable against biological parents and not the state. This precludes children from making claims against the state, including claims to the provision of goods and services which enhance the child’s balanced development.

9; JJ Rousseau *His educational theories selected from Emile, Julie and Other Writings* (1964) 92; J Goldstein ‘Medical care for the child at risk: On state supervision of parental autonomy’ (1977) 86 *Yale Law Journal* 645; S Firestone *The dialectic of sex: The case for feminist revolution* (1970) 72-104; M Wald ‘Making sense out of the rights of youth’ (1974) 4 *Human Rights* 13, 15; J Roche ‘Children: Rights, participation and citizenship’ (1999) 6 *Childhood* 475, 481; ML Fineman ‘The politics of custody and gender: Child advocacy and the transformation of custody decision-making in the USA’ in C Smart and S Sevenhuijsen (eds) *Child custody and the politics of gender* (1989) 27, 34 and JS Polier ‘Problems involving family and child’ (1966) 66 *Columbia Law Review* 305, 306.

⁹⁹ *Second Treatise* para 65.

¹⁰⁰ For a detailed discussion of this concept, see E Fox-Decent ‘The Fiduciary Nature of State Legal Authority’ (2005) 31 *Queen’s Law Journal* 259.

¹⁰¹ See M Bryan ‘Parents as fiduciaries: A special place in equity’ (1995) 3(2) *International Journal of Children’s Rights* 227.

¹⁰² See generally *First Treatise*, para 100; see also CK Beck; G Glavis, SA Glover and MB Jenkins ‘The rights of children: A trust model’ (1978) 46(4) *Fordham Law Review* 669-780.

¹⁰³ See J Feinberg ‘Duties, rights and claims’ (1966) 3 *American Philosophy Quarterly* 143; and B Bandman ‘Do children have any natural rights? A look at rights and claims in legal, moral and educational discourse’, *Proceedings of the 29th Annual Meeting of the Philosophy of Education Society* 234, 237, observing that ‘claims express a desire, a request, a demand or plea for something more permanent or general, for a social agreement that attaches to or belongs to a person by virtue of his being a person and that, if the agreement holds, cannot whimsically be taken away’.

Another shortcoming emanates from the model's failure to grant adolescents relative autonomy when they acquire certain competences. This problem arises from marrying the acquisition of capacity to the attainment of the age of majority. To be a fully compact theory of children's rights, the fiduciary model should generally recognise that as child's capacities evolve, the rigour of parental control should gradually be reduced. In its traditional form, the model protects welfare rights only and denies children relative autonomy rights until they attain majority status. Regardless of these limited criticisms, the fiduciary model stands as one of the most realistic theories of children's rights. If modified to incorporate the possibility that competent children may gradually attain autonomy in certain areas of the law, the theory will overcome one of its greatest limitations in balancing child participation, parental rights and state intervention.

4 THE THEORY OF PATERNALISM

4.1 Definition and justification

Generally, paternalism involves an individual or the state making judgments about what is in another person's best interest and requiring that other person to follow the instructions given by the decision-maker.¹⁰⁴ Paternalism is justified when persons for whom decisions are made are incapable of making choices they would if they had the capacity to do so. Under the theory of paternalism, parents are entitled to make decisions which children would have made had the latter been capable of making decisions which broaden their overall stock of the good. The main justification for paternalism is the child's lack of capacity for rational autonomy. According to Archard, '[c]hildren are thought to merit paternalism both because they have not yet developed the cognitive capacity to make intelligent decisions in light of relevant information about themselves, and because they are prone to emotional inconstancy such that their decisions are likely to be wild and variable'.¹⁰⁵ This cognitive incapacity means that many decisions liberally made by children are likely to cause severe harm to them. Children need to be guided by adults.

¹⁰⁴ For a detailed definition of paternalism, see B Gert and CM Culver 'Paternalistic behaviour' (1976) 6(1) *Philosophy and Public Affairs* 45, 49-50.

¹⁰⁵ Archard (note 7 above) 78.

Whilst adults are presumed to be competent to make independent decisions that are in their own best interests, children are presumed to lack such capacities except in areas where the law clearly presumes them competent to make such decisions. Another justification for paternalism, related to the first, is that the child's decisions affect not only their immediate empirical self, but also their future ideal self. To ensure that children's ideal selves materialise in future, parents have to make certain paternalistic decisions to shield the child's future interests from the child's impulsive decision-making now. This narrative makes it clear that the theory of paternalism shares with the fiduciary theory the concept of future-oriented consent as the paternalist is required to consider the interests of the adult the child will gradually become. Paternalism arises from the idea that there are instances when persons know better what other less capable individuals need in order to increase the latter's overall stock of the good.

4.2 Historical origins and gradual development

The theory of paternalism developed first as an exception to the doctrine of individual liberty and later as a fitting response to the emergence of child liberation ideology. As evidenced by discussions on the property theory and the fiduciary model, traces of paternalism date back to Aristotle, Plato, Filmer, Hobbes and even Locke. In the first half of the 20th Century, Bentham observed that the need for protective paternalism arises from the undeveloped state of the child's intellectual faculties and the inability to regulate impulses or to sacrifice current desires for future benefit.¹⁰⁶ Nevertheless, it was the work of liberal English philosopher John Stuart Mill which brought the theory of paternalism to the forefront. Mill propounded a doctrine of liberty in terms of which an individual could not be rightly coerced to do something even if such coercion was in that person's best interest. He famously claimed that '[o]ver himself, over his own body and mind, the individual is sovereign' to signify that liberty applied to all aspects of adult life.¹⁰⁷ Thus, the notion of liberty connotes the absence of any form of coercion.¹⁰⁸ Mill recognised that if applied to children, this version of liberty would expose them to many dangers, including the

¹⁰⁶ J Bentham *The theory of legislation* (1840) 248 and S Freud *Inhibitions, symptoms and anxieties* (1926) 139-40.

¹⁰⁷ See JS Mill *On liberty* (1859) J Manis (ed) (The Pennsylvania State University; 1998) 12-13.

¹⁰⁸ JS Mill *Utilitarianism, on liberty, essay on Bentham* Warnock M (ed) (1962) 108, where he argues that autonomy 'requires liberty of tasks and pursuits, of forming the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow creatures, so long as what we do does not harm them'.

danger of failing to develop into rationally autonomous individuals. As a result, his doctrine of liberty was not applicable to children. In *On Liberty*, he observes:

It is, perhaps, hardly necessary to say that this doctrine [individual liberty] is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age *which the law may fix as* that of manhood or womanhood. Those who are still in a state to require being taken care of by others *must be protected against their own actions* as well as against external injury.¹⁰⁹

Mill refuses to problematise the law and simply refers to the legal age of majority as the decisive factor in determining whether an individual possesses the capacity for rational autonomy. The passage referred to above justifies parental paternalism over children and emphasises that children have no capacity to make independent decisions rationally. Like the fiduciary model, paternalism acknowledges that children, particularly the very young, cannot make independent decisions without harming themselves.¹¹⁰ It recognises that children need to be protected against themselves for them to grow into healthy, responsible and autonomous citizens. Paternalism also acknowledges that during childhood, it may be necessary to coerce children and restrict their autonomy if, by exercising unrestrained autonomy, children will threaten their existing or potential stock of the good.¹¹¹

Since the early to mid-1970s, the emergence of child liberation ideology has further heightened the importance of the theory of paternalism. In essence, child liberationists seek to extrapolate Mill's version of adult autonomy to the discourse on children's rights.¹¹² Writing in the 1970s, Americans Richard Farson and John Holt were among the first proponents of children's liberation and autonomy from all forms of social control. Holt's list of rights to which children are entitled includes the right to vote and participate in political affairs; the right to be legally

¹⁰⁹ Mill (note 107 above) 13.

¹¹⁰ RP Wolff *In defence of anarchism* (1970) 12, stating that children are 'not fully responsible for their actions [as they] lack freedom of choice ... [and] do not yet possess the power of reason in a developed form'.

¹¹¹ J Fortin 'Children's rights and the use of force "in their own best interests"' in J Dewar and S Parker (eds) *Family law: Processes, practices and pressures*, Proceedings of the Tenth World Conference of the International Society of Family Law, July, 2000, Brisbane, Australia (2003) 360, 363, where the author argues that '[a] commitment to the concept of children's rights is certainly not inconsistent with paternalistic coercion and restriction, if without that coercion and without that restriction of the child's own choices, his or her life-chances would be gravely limited'.

¹¹² It is important to note that child autonomy theorists avoid making this claim in explicit terms, but their arguments are to that effect.

responsible for one's life and acts; the right to work for an income; the right to privacy; the right to total financial independence and responsibility; the right to direct and manage one's education; the right to travel, to reside away from the family home and to choose one's own home; the right to receive from the state whatever minimum income it gives to adult citizens; the right to seek and choose guardians other than one's own parents and to be legally dependent on them; and the right to do what *any adult may legally do*.¹¹³ Farson made a more or less similar list of children's rights.¹¹⁴

According to both scholars, the right to self determination is the genesis of child liberation and from it flows all human rights, including children's involvement in decision making. In their world, children's rights can only be realised if children enjoy total autonomy to decide what is good for them.¹¹⁵ In *Birthrights*, Farson insisted that-

Children should have the right to decide the matters which affect them most directly. This is the *basic right upon which all others depend*. Children are now treated as the private property of their parents on the basis that it is the parents' right and responsibility to control the life of the child. The achievement of children's rights, however, would reduce the need for this control and bring about an end to the double standard of morals and behaviour for adults and children.¹¹⁶

Three years earlier, another liberationist had advocated for an adolescent to have 'a right to find his own way and determine on his own how he is going to learn, what he wants, what he rejects, what kind of art he likes, what kind of art he dislikes, what books he wants to read, in which way, if any, he wants to worship'.¹¹⁷ Virtually all the liberationists of the 1970s required societies to grant children autonomy to participate in personal decision-making. Holt thought that 'no human right, except the right to life itself' was more important than 'the right to decide what [one] will be curious about' and that to be deprived of this right was tantamount to having one's

¹¹³ See J Holt *Escape from childhood* (1975). For a slightly different version of liberationist thinking, see also H Cohen *Equal rights for children* (1980) 60-69.

¹¹⁴ For a fuller discussion of child liberation ideology, see M Freeman 'Whither children: Protection, participation and autonomy' (1993-1994) 22 *Manitoba Law Journal* 307, 308-16.

¹¹⁵ See R Bessner *The voice of the child in divorce, custody and access proceedings*, Background Paper, Department of Justice, Canada (2002) 5.

¹¹⁶ R Farson *Birthrights: A Bill of Rights for children* (1974) 27. See also D Gotlieb (ed) *Children's liberation* (1973); B Gross and R Gross (eds) *The children's rights movement* (1977) 329-33 and PE Veerman *The rights of the child and the changing image of the child* (1992) 133-152.

¹¹⁷ R Ollendorff 'The rights of adolescents' in P Adams (ed) *Children's rights: Toward the liberation of the child* (1971) 91, 120.

right to freedom of thought destroyed.¹¹⁸ He wanted children ‘to have the right...to decide whether they want to learn in a school and if so which one and for how much of the time’.¹¹⁹ Both Farson and Holt defended children’s right to sexual autonomy – particularly every child’s right to consent to or refuse sex. Another liberationist of the 1970s, Hillary Rodham, as she then was, questioned the rationality of regulations based upon age and advocated for a presumption of competence for the young. The presumption of competence, she argued, would imply that children, like other natural persons, are capable of exercising rights and performing responsibilities until the contrary is proven. Further, the reversal of the presumption of incompetence for the young would shift the burden of proof to adults who allege that the child does not have the capacity to make rational choices.¹²⁰

However, child liberation ideology exaggerates the usefulness of autonomy by its tendency to wipe out the importance of age and capacity in the exercise of autonomy rights. Autonomy is not an all or nothing concept and, as demonstrated by Raz, a number of reasons may justify the coercion of a person to do certain things against his or her will. These reasons include the need to protect others and to protect the coerced individual’s long term personal autonomy or some other compelling communal interest.¹²¹ In the context of children’s claims to autonomy rights, paternalism is often justified because it is necessary to protect both the child’s welfare and long term personal autonomy.

Some contemporary writers have acknowledged the importance of child autonomy without eliminating completely the concept of paternalism.¹²² Freeman has introduced the concept of ‘liberal paternalism’.¹²³ This concept suggests that children’s autonomy should be limited at the point when it begins to lead to ‘irrational actions’. Relying on Richards, Freeman stipulates further requirements to be met in determining whether intervention protects the child from

¹¹⁸ Holt (note 113 above) 186.

¹¹⁹ Ibid, 187.

¹²⁰ H Rodham ‘Children under the law’ (1973) 43 *Harvard Educational Review* 1, 17.

¹²¹ J Raz ‘Liberty and trust’ in R George (ed) *Natural law, liberalism and morality* (1996) 113, 121; see also J Raz ‘Hart on moral rights and legal duties’ (1984) 4(1) *Oxford Journal of Legal Studies* 123, 127-29; reasoning that it is possible to reconcile utilitarianism and human rights.

¹²² MD Freeman ‘Introduction’ in MD Freeman *Children’s rights* Vol 1 (ed) (2004) xi, xviii.

¹²³ MDA Freeman ‘Taking children’s rights more seriously’ (1992) 6 *International Journal of Law and the Family* 52, 66-69.

irrational actions. First, the intervention should not be based on the subjective values of the decision-maker. This means that the ‘notion of rationality must be defined in terms of a neutral theory that can accommodate the many visions of the good life that are compatible with moral constraints’.¹²⁴ Acts should be regarded as irrational only when they frustrate the individual’s system of ends. Second, for paternalism to be valid, the irrationality of the child’s actions should be ‘severe and systematic, perhaps due to undeveloped or impaired capacities, or lack of opportunities to exercise such capacities, and a severe and permanent impairment of interests is in prospect’.¹²⁵ This requirement establishes a high threshold for parental or state intervention and extends to the child the right to learn from their own mistakes, especially where the matter in question does not cause severe or permanent impairment of his or her interests.¹²⁶

The last restraint to paternalism is that ‘within the already specified grounds of permissible paternalism, intervention is justified only to the extent necessary to obviate the immediate harm or to develop the capacities of rational choice by which the individual may have a fair chance to avoid such harms on her or his own’.¹²⁷ According to Freeman, these constraints to paternalism make it liberal and impose on parents the obligation to assist children to develop their capacities for independent decision-making.¹²⁸ Freeman primarily relies on Rawls’ theory of justice to demonstrate that children, to the extent that they are capable,¹²⁹ are participants in the formation of the original social contract. In Rawlsian terms, persons that have the ‘capacity, whether or not it is yet developed, [are entitled] to receive the full protection of the principles of justice’.¹³⁰ While there is academic support for the view that Rawls intended to include children in his theory of justice,¹³¹ it is not clear that he intended either to eliminate paternalism altogether or to make it liberal. Finally, it must be underlined that contemporary accounts of paternalism often

¹²⁴ DAJ Richards ‘The individual, the family and the Constitution: A jurisprudential perspective’ (1980) 55 *New York University Law Review* 1, 19.

¹²⁵ Ibid.

¹²⁶ See RM Dworkin ‘Taking rights seriously’ in AWB Simpson (ed) *Essays in jurisprudence* (1973) 204-17, differentiating between having a right to act in a particular way and doing the right thing.

¹²⁷ Richards (note 124 above) 19-20.

¹²⁸ Freeman (note 78 above) 56.

¹²⁹ It must be noted that Rawls does not refer to actual capacity, but the potential to have it.

¹³⁰ J Rawls *A theory of justice* (1971) 509.

¹³¹ V Worsfold ‘A philosophical justification for children’s rights’ (1974) 44(1) *Harvard Educational Review* 142, 153-54, insists that ‘Rawls wants us to take account of our intuitive sense that even quite young children do know what they want, and are capable of weighing alternatives and of acting on the decisions they make – precisely the kind of deliberation required of those choosing in the original principles’.

overlap with traditional notions of fiduciary relations. The majority of scholars who defend paternalism argue that to determine whether current restrictions of children's autonomy are justifiable we should ask the question whether the child will 'eventually com[e] to see the correctness of his parent's interventions'.¹³² As noted above, this is the notion of retrospective consent.

4.3 Critical appraisal

In general terms, the theory of paternalism explains the nature of parent-child relations and the role of the state in supervising the exercise of parental responsibility over children. Paternalism confers limited rights on children, particularly rights to have their welfare secured by parents and, if needs be, the state. It recognises parents' rights to raise their children as they see fit. Yet, as Gutman observes, 'these negative rights of parents over their children are not very broad or inviolable. Parents' rights are seriously constrained by the rights of their children, which are in turn dependent upon the nature of the society within which children are to be raised'.¹³³ Whether liberal or not, the theory of paternalism allows parents to regulate the exercise of autonomy rights by children and, in most cases, to limit autonomy rights where they conflict with the long term interests of the child. In light of children's immaturity and limited capacities, this is an important regulatory function and remains one of the theory's meaningful contributions towards a realistic theory of children's rights. Like the fiduciary model, paternalism correctly acknowledges that the possession by young children of the right to absolute autonomy is inconsistent with their development into adults who can lead meaningful lives and exercise autonomy properly. It counters dissident views about child autonomy and allows parents to ensure that children are not abandoned to their autonomy.

¹³² G Dworkin 'Paternalism' in RA Wasserstrom (ed) *Morality and the law* (1971) 107, 119. See also B Franklin 'The case for children's rights: A progress report' in B Franklin (ed) *The handbook of children's rights: Comparative policy and practice* (1995) 3, 13 and G Dworkin 'Consent, representation and proxy consent' in W Gaylin and R Macklin (eds) *Who speaks for the child: The problems of proxy consent* (1982) 193, 205, contending that '[parents] ought to choose for [children], not as they might want, but in terms of maximising those interests that will make it possible for them to develop life plans of their own. We ought to preserve their share of what Rawls calls 'primary goods'; that is, such goods as liberty, health and opportunity, which any rational person would want to pursue whatever particular life plan he chooses'.

¹³³ A Gutman 'Children, paternalism, and education: A liberal argument' (1980) 9(4) *Philosophy and Public Affairs* 338, 347. For a conservative view on this point, see *Wisconsin v. Yoder*, 406 U.S. 210-211.

Paternalism is a fitting response to calls for absolute autonomy from child liberationists. Child liberationists seek to confer absolute autonomy on children of all ages regardless of the individual capacities of each child. Paternalism recognises that this is an untenable situation as it exposes young children to the adverse consequences of many ill-considered decisions and downplays adults' duty to protect children against themselves. One leading scholar on children's rights has correctly observed that the complete 'irrelevance of age' asserted by child liberationists 'does not square with our knowledge of biology, psychology or economics'.¹³⁴ Thus, the advantage with the theory of paternalism is that it recognises that the portrayal of children as relative incompetents is not mere ideology. This is consistent with a wealth of scientific authority positively establishing that children lack adult-level competences.¹³⁵

Paternalism also recognises that children's autonomy undermines not only the very young's right to be protected against themselves and others, but the role parents and significant others play in preparing the child for rational autonomy. Young children lack the capacity to know what is good for them and parents bear the responsibility to make decisions in the interests of children.¹³⁶ As Gaylin notes, 'when autonomous rights cannot be exercised by an individual because that person is a child, a surrogate exercises this power through proxy consent'.¹³⁷ In Freeman's

¹³⁴ Freeman (note 78 above) 23.

¹³⁵ See ER. Sowell, PM Thompson, KD Tessner, and AW Toga (eds) 'Mapping continued brain growth and gray matter density reduction in dorsal frontal cortex: Inverse relationships during post-adolescent brain maturation' (2001) 21(22) *The Journal of neuroscience* 8819, 8819; ER Sowell; PM Thompson; CJ Holmes; TL Jernigan and AW Toga 'In vivo evidence for post-adolescent brain maturation in frontal and striatal regions' (1999) 2(10) *Nature neuroscience* 859; T Grisso 'The competence of adolescents as trial defendants' (1997) 3 *Psychology, Public Policy and Law* 3, 8; L Kohlberg *Collected papers on moral development and education* (1973); J Piaget *The moral judgment of the child* (1965); NG Guerra, L Nucci and RL Huesmann 'Moral cognition and childhood aggression' in RL Huesmann (ed) *Aggressive behaviour: Current perspectives* (1994) 13, 23; T Grisso 'What we know about youth's capacities' in T Grisso and RG Schwartz (eds) *Youth on trial: A developmental perspective on juvenile justice* (2000) 267-269; ES Scott, D Reppucci, JL Woolard 'Evaluating adolescent decision-making in legal contexts' (1995) 19 *Law and human behaviour* 221; Jani-Erik Nurmi 'How do adolescents see their future? A review of the development of future orientation and planning' (1991) 11 *Developmental Review* 1; J Arnett 'Reckless behaviour in adolescence: A developmental perspective' (1992) 12 *Developmental Review* 339; E Scott and T Grisso 'The evolution of adolescence: A developmental perspective on juvenile justice reform' (1998) 88(1) *The Journal of Criminal Law and Criminology* 137; JD Aronson 'Neuroscience and juvenile justice' (2009) 42 *Akron Law Review* 917; KM Johnson 'Juvenile competency statutes: A model for state legislation' (2006) 81 *Indiana Law Journal* 1067; ES Scott and T Grisso 'Developmental incompetence, due process and juvenile justice policy' (2004-2005) 83 *North Carolina Law Review* 793; and L Steinberg and E Cauffman 'Maturity of judgment in adolescence: Psychosocial factors in adolescent decision making' (1996) 20(3) *Law and Human Behaviour* 249.

¹³⁶ See generally J Bentham *An introduction to the principles of morals and legislation* JH Burns and HLA Hart (eds) (1970) 244-45.

¹³⁷ WMD Gaylin 'Who speaks for the helpless: The question of proxy consent' (1979) 18 *Journal of the American Academy of Child Psychiatry* 419, 419.

words, one should not only be cognisant of the integrity of the child and her decision-making capacities, but also of the dangers of complete liberation.¹³⁸ Therefore, the restrictions on child participation in ‘adult only’ domains of social life are rooted in the child’s right to be protected from his or her own immature judgment. When children are very young, adults have the sovereign power to determine whether or not particular activities are in the former’s interest.

Both paternalism and the fiduciary model justify parental control if the child over whom it is exercised may reasonably be thought of as likely to grant retrospective consent (on becoming an adult) to the way the parent vetoed the child’s decisions. This approach generates what Archard calls ‘self-justifying paternalism’ as adults both overlook the need to consult children now and seek to change children into adults whose retrospective consent legitimates the prevailing form of upbringing. We do not raise children in particular ways because we want children (on becoming adults) to retrospectively approve of the way they were brought up, but we raise children in particular ways because there are specific individual and social benefits that accrue from the production of certain kinds of adults. For instance, we order children to attend primary education against their will because we know that education has particular benefits to the child, society and the state.¹³⁹

While paternalism does not prescribe the sort of duties the state owes to children, it fully recognises the need for state intervention on two grounds. First, abuse of parental power or neglect of parental responsibility would justify the state’s intervention in the private family. Another ground arises when the child, with or without parental support, exercises autonomy in a way that jeopardises the very child’s gradual development into a rational adult. Children have rights to special care and protection, including protection against the uninformed enjoyment of autonomy rights. In this light, paternalism attempts to establish efficient mechanisms for curbing not only the child’s decisional autonomy, but the parent’s autonomy in controlling children who have no capacity to make rational decisions.

¹³⁸ M Freeman ‘Taking children’s rights more seriously’ in P Alston, S Parker and J Seymour (eds) *Children, rights and the law* 52, 66-69.

¹³⁹ See generally G Haydon, ‘The “Right to education” and compulsory schooling’ (1977) 9(1) *Educational Philosophy and Theory* 1-14.

One of the fundamental shortcomings of paternalism is that it does not explicitly recognise that children should gradually be given participation and relative autonomy in decision-making. Given that it applies generally to all children, paternalism justifies the exclusion of children from the domain of decision-making until they become majors or attain the age of consent in certain areas of the law. Ordinarily, the theory of paternalism leaves no space for the child to exercise meaningful participation before attaining the age of majority.¹⁴⁰ Thus, the theory should give space for children to participate in decision-making as a way of developing their capacity for rational autonomy in the future.

Attempts to liberalise paternalism may improve the state of children's rights under the theory of paternalism. It was demonstrated, above, that the child's actions should be regarded as irrational only when they frustrate the individual's system of ends; that the decision on whether the child's view is irrational should not be based on the subjective views of the parent; that paternalism is valid when the child's proposed actions would result in 'a severe and permanent impairment' of the child's interests and that paternalistic intervention is justifiable only when 'necessary to [preclude] immediate harm or to develop' children's capacities for rational choice. These conditions ensure that paternalism does not support a blanket disregard of the child's views, but is justified only in relation to those decisions which seriously endanger the child's future well-being. To be fully coherent, paternalism needs to see children as holders of rights and to outline, in broad terms, the sort of rights children have against parents and the state. Yet, even in its current form, the theory should be commended for recognising the importance of competence to the full enjoyment of autonomy rights.

¹⁴⁰ On why children should be given the space to grow into autonomous human beings, see R Carter 'Justifying paternalism' 7(1) *Canadian Journal of Philosophy* (1977) 133-45 and JD Hodson 'The Principle of paternalism' 14(1) *American Philosophical Quarterly* (1977) 61-9 and S Brennan 'Children's choices or children's interests: Which do their rights protect?' in Archard and Macleod (note 18 above) 53, 62

5 THE INTEREST THEORY OF RIGHTS

5.1 Definition and justification

The interest (or benefit) theory of rights holds that the main role of rights is to protect and promote the right-holder's interests. On this formulation, rights precede and require the imposition of duties on others. Raz observes that 'a law creates a right if it is based on and expresses the view that someone has an interest which is sufficient ground for holding another to be subject to a duty', and that for a legal rule to confer a right, it should be motivated by the fact that 'the right holder's interest should be protected by the imposition of duties on others'.¹⁴¹ Thus, an individual has rights if his or her interest is a ground for having rules which require others to behave in specific ways in relation to these rules.

For interests to create rights, they must be of such significance that it will be improper to deny the holder of such interests the benefits that must be provided to ensure the enjoyment of the rights created thereby. MacCormick argues that 'to ascribe to all members of a class C a right to treatment T is to presuppose that T is, in all normal circumstances, a good for every member of C...When a right to T is conferred by law on all members of C, the law is envisaged as advancing the interests of each and every member of C on the supposition that T is a good for every member of C, and the law has the effect of making it legally wrongful to withhold T from any member of C'.¹⁴² Thus, the significance of certain interests justifies extending certain rights to children.

5.2 Historical origins and gradual development

In its early forms, the interest theory held a right holder 'to be the beneficiary of another's duty or obligation'.¹⁴³ The origin of the interest theory is largely attributed to the work of Bentham.¹⁴⁴

¹⁴¹ J Raz 'Legal rights' (1984) 4(1) *Oxford Journal of Legal Studies* 1, 13-14.

¹⁴² N MacCormick 'Children's rights: A test case for theories of right' (1976) 62 *Archiv fur Rechts-und Sozialphilosophie* 305, 311 and S Human 'The theory of children's rights' in T Boezaart (ed) *Child law in South Africa* 243, 249.

¹⁴³ D Lyons 'Rights, claimants and beneficiaries' in D Lyons (ed) *Rights, welfare and Mill's moral theory* (1994) 23.

Generally, Bentham proposed that conduct which has the effect of depriving another from an interest he has in a particular object or from the benefit he derives from certain services, constitutes an offence to that person.¹⁴⁵ The concept of benefit or services includes the provision, by others, of services which are regarded as desirable or in the interest of the beneficiary.¹⁴⁶ Therefore, persons who are intended by the law to benefit from others' duties have rights emanating from the duties which the law imposes on those others.¹⁴⁷ This version of the interest theory was unsatisfactory as rights do not necessarily exist because others are legally bound to fulfill the duties they impose. Besides, 'not all interests protected by duties give rise to a right on the part of the beneficiary of the duty'.¹⁴⁸ Refined versions of the interest theory have notably been developed by Raz, Kramer, and Eekelaar, among others.

Raz proposes a version of the interest theory which locates as rights holders persons whose interests are sufficient grounds for holding others to be under a duty to promote those interests. Rights are grounds or reasons for requiring other persons to act in a way that protects or promotes the interest of the right holder. To generate rights, an interest must be a ground for holding another to behave in a specific way, it must have the peremptory character of a duty and the duty it creates must be for conduct which 'makes a significant difference for the promotion or protection of that interest'.¹⁴⁹ Raz explains that 'interests are part of the justification of the rights which [in turn] are part of the justification of duties'.¹⁵⁰ To say that a person has a right (an interest which requires others to act in certain ways) is to say that there are no compelling contrary considerations which can be reasons for denying that person the right in question.¹⁵¹ Therefore, individuals have no rights when there are important opposite considerations which

¹⁴⁴ It is important to note that although some scholars have found traces of the interest theory in Hofeld's exposition of jural relations, Hofeld's classifications of legal relations are very neutral and can fit into the framework of both the interest theory and the choice theory. See generally W Hofeld *Fundamental legal conceptions as applied in legal reasoning* (1919).

¹⁴⁵ J Bentham *An introduction to the principles of morals and legislation* J Burns and HLA Hart (eds) (1996) 188-193.

¹⁴⁶ HLA Hart 'Bentham on legal rights' in AWB Simpson (ed) *Oxford essays in jurisprudence* (1973) 172, 184.

¹⁴⁷ Ibid, 186. See also HLA Hart 'Legal rights' in HLA Hart (ed) *Essays on Bentham: Studies in jurisprudence and political theory* (1982) 162-93.

¹⁴⁸ For a detailed discussion of these criticisms, see A Harel 'Theories of rights' in MP Golding and WA Edmundson (eds) *The Blackwell guide to the philosophy of law and legal theory* (2005) 191, 195.

¹⁴⁹ J Raz *The morality of freedom* (1986) 183.

¹⁵⁰ Ibid, 181.

¹⁵¹ Ibid, 182-83.

override the interests of the potential right-holder, or weaken the power of such interests and no one could justifiably be held to be under a duty on account of those opposite interests.¹⁵²

To understand the interest theory of rights better, it is necessary to contrast it to the choice or will theory of rights.¹⁵³ There is academic consensus on the point that the choice theory denies rights to children because it extends rights only to individuals who have the ability to will to do certain things and to require others to perform the duties imposed on them by the right. Children, it is argued, often lack the capacity to enforce or waive their claims against others and would therefore lack rights under the choice theory.¹⁵⁴ For instance, Hart argues that being a bearer of rights presumes the possession of capacity and that children lack rights because they lack such capacities.¹⁵⁵ Other choice theorists have defended this proposition.¹⁵⁶ As explained above, interest theorists argue that to extend rights to particular classes of people is not to make remarks about their capacities as having rights means having interests important enough to impose duties on others.¹⁵⁷ In terms of the interest theory, children have interests that are grounds for holding others under a duty to respect and promote their rights. For an individual to hold rights under the interest theory, the correlative duty must normatively protect their interests and it is neither necessary nor sufficient for them to be competent 'to demand or waive the enforcement of the

¹⁵² Ibid, 184.

¹⁵³ For a comparison between the choice and interest theories of rights, see GW Parton and DP Derham (eds) *A textbook of jurisprudence* 4 ed (1972) 285-90; R Goodin and D Gibson 'Rights, young and old' (1997) 17(2) *Oxford Journal of Legal Studies* 185, 186-88; and H Brighouse 'What rights (if any) do children have' in Archard and Macleod (note 18 above) 31.

¹⁵⁴ MH Kramer, NE Simmonds and H Steiner (eds) *A debate over rights: Philosophical inquiries* (1998) 69; and LW Sumner *The moral foundation of rights* (1987) 203.

¹⁵⁵ HLA Hart 'Are there any natural rights?' (1955) LXIV *Philosophical Review* 175, 181; HLA Hart *Essays on Bentham: Studies in jurisprudence and political theory* (1982) 94; HLA Hart 'Are there any natural rights?' in AI Melden (ed) *Human rights* (1970) 61, 61-62; and HLA Hart *The concept of law* (1961) 28.

¹⁵⁶ For a defence of capacity as a ground for extending rights to adults and children, see J Feinberg 'Legal paternalism' (1971) 1(1) *Canadian Journal of Philosophy* 105, especially at 105 and 112; and NE Simmonds 'Rights at the cutting edge' in MH Kramer, NE Simmonds and H Steiner (eds) *A debate over rights* (1998) 113, 225.

¹⁵⁷ See J Harris 'The political status of children' in K Graham (ed) *Contemporary political philosophy: Radical studies* (1982) 35; KH Federle 'Rights flow downhill' (1994) 2 *International Journal of Children's Rights* 343, 344-68; M Kramer 'Rights in legal and political philosophy' in K Whittington, D Kelemen, and G Caldeira (eds) *The Oxford handbook of law and politics* (2008) 417; KH Federle 'Looking for rights in all the wrong places: Resolving custody disputes in divorce proceedings' (1994) 15 *Cardozo Law Review* 1523, 1527; I Kant *The metaphysical elements of justice* (1965) 45; KH Federle 'On the road to reconceiving rights for children: A post-feminist analysis of the capacity principle' (1993) 42 *DePaul Law Review* 983 and LD Houlgate *The child and the state: A normative theory of juvenile rights* (1980) 88.

duty that is correlative to the right'.¹⁵⁸ While the interest theory entertains the possibility that the power of enforcement/waiver for any particular right may not necessarily be held by the holder of rights, the choice theorists require rights holders to possess personally the power to require others to perform obligations imposed on them by their rights. Most children, lacking in the power to enforce or waive their rights and relying on the capacities of surrogates such as parents, can only have rights under the interest theory of rights.

Eekelaar develops the interest theory further and argues that children have three types of interests. These include basic, developmental and autonomy interests.¹⁵⁹ Basic interests protect children and require parents to ensure that children's physical, emotional and intellectual needs are met. These interests create less contentious rights and impose on parents the duty to ensure adequate provision of goods that will enhance the healthy development of the child.¹⁶⁰ At this level, the main role of the state is to ensure that parents or guardians refrain from violating the child's basic interests. Developmental interests require that 'all children should have an equal opportunity to maximize the resources available to them during their childhood (including their own inherent abilities) so as to maximize the degree to which they enter adult life unaffected by avoidable prejudices incurred during childhood. In short, their capacities have to be developed to their best advantage'.¹⁶¹

The realisation of rights created by the developmental interest largely turns on the economic structure of society and the duty to develop the capacities of children (by providing education

¹⁵⁸ MW Kramer 'Refining the interest theory of rights' (2010) 55 *The American Journal of Jurisprudence* 31, 32, portrays the interest theory in the following two propositions:

(I) Necessary though insufficient for the holding of a legal right by *X* is that the duty correlative to the right, when actual, normatively protects some aspect of *X*'s situation that on balance is typically in the interest of a human being or collectivity or nonhuman animal.

(II) Neither necessary nor sufficient for the holding of some specified legal right by *X* is that *X* is competent and authorized to demand or waive the enforcement of the duty that is correlative to the right.

¹⁵⁹ Wald defends a similar description of claims to rights. See MS Wald 'Children's rights: A framework of analysis' (1979) 12(2) *University of California, Davis Law Review* 255, 260, classifying rights into the following categories: rights against the world; rights to greater protection from abuse, neglect or exploitation by adults; the right to be treated in the same manner as adults and rights to act independently of parental control or guidance.

¹⁶⁰ J Eekelaar 'The emergence of children's rights' (1986) 6 *Oxford Journal of Legal Studies* 161, 170.

¹⁶¹ Ibid. See also J Eekelaar 'Parents and children – Rights, responsibilities and needs: An English perspective' (1984) 2 *Human Rights Annual* 81-93.

and health services for instance) lies primarily with the political organs of the state.¹⁶² Autonomy interests concern the child's 'freedom to choose his own life style and to enter social relations according to his own inclinations uncontrolled by the authority of the adult world, whether parents or institutions'.¹⁶³ The interest theory acknowledges that children incrementally attain rights to self-determination based on their interest in choice. Campbell, another interest theorist, notes that since the transitional period between childhood and 'full-blown adulthood' marks the development of near-adult capacities, adolescents have 'considerable autonomy interests and many of the rights of the child may be seen as recognizing this fact.'¹⁶⁴

Eekelaar recognises children's general lack of capacity to decide what is best for them and proposes a test in terms of which it becomes imperative 'to make some kind of imaginative leap and guess what a child might retrospectively have wanted once it reaches a position of maturity'.¹⁶⁵ He also recognises that conflicts are bound to arise between the child's autonomy interest, on the one hand, and the child's own basic or developmental interests, on the other. He then proposes that in the event of conflicts between these interests, the child's autonomy interests should give way to the latter interests as persons may later regret that some control was not exercised over their immature judgment by adults charged with the responsibility to protect them.¹⁶⁶ This is because children have the right to be protected against their own desires and preferences if their satisfaction would deny them the opportunity to achieve rational autonomy as adults.¹⁶⁷

¹⁶² Eekelaar (note 160 above) 172 and 173.

¹⁶³ Ibid, 171.

¹⁶⁴ TD Campbell 'The rights of the minor: As person, as child, as juvenile, as future adult' in Alston, Parker and Seymour (note 139 above) 1, 19.

¹⁶⁵ Eekelaar (note 160 above) 170. See also J Eekelaar *Regulating divorce* (1991) 103, recognising that an ideology in terms of which children have rights does not actually exist, but should be advanced as a challenge to the way the community treats its children. Therefore, he observes that society does not necessarily recognise all rights creating-interests, but explains that the three types of interests represent the sort of rights children would retrospectively claim on attaining majority status.

¹⁶⁶ Eekelaar (note 160 above) 171 and 181-82.

¹⁶⁷ See also Freeman (note 78 above) 57.

5.3 Critical appraisal

The interest theory has many advantages over other theories of children's rights. First, it confers on children different kinds of rights, in the form of interests, and does not rely on artificial notions of capacity as the sole determinant of whether or not an individual possesses rights. It extends to children rights to the provision of basic amenities of life (such as food and shelter), to services which enhance the development of their capacities, to participate in decision-making and to exercise autonomy relative to their age. More importantly, the interest theory recognises that the vulnerability and powerlessness of people should not be a legal reason for denying them human rights. The capacity to waive or enforce is ancillary to, not constitutive of rights. Thus, children are entitled to many rights even if they have no power and legal capacity to claim these rights for themselves. This claim has support from Kramer who posits that in terms of the 'interest theory, anybody can hold a legal right irrespective of whether he holds any legal power to enforce/waive the duty that is correlative to the right'.¹⁶⁸

Elsewhere, Eekelaar has pursued this argument to the extent of claiming that any theoretical framework which emphasises welfare and excludes the possibility of the right holder's participation in the decision-making process cannot be said to protect human rights.¹⁶⁹ This study does not seek to advance this view, but to acknowledge the importance of the interest theory for the recognition of children's rights. Another advantage of the interest theory, particularly as developed by Eekelaar, arises from its ability to identify the different sorts of interests that can possibly give rise to rights and to rank these interests in a manner that subordinates children's claims to autonomy to their basic and developmental interests. To this end, parents and the state should ensure that the child exercises their rights in a manner consistent with their developing capacities. They should ensure that the child does not exercise autonomy rights in a way that threatens the basic and developmental aspects of the human person. In this way, the interest

¹⁶⁸ MH Kramer 'On the nature of legal rights' (2000) 59(3) *Cambridge Law Journal* 473, 474.

¹⁶⁹ J Eekelaar 'Personal rights and human rights' in P Lødrup and E Modvar (eds) *Family life and human rights* (2004) 179, 183 and J Eekelaar 'Families and children: From welfarism to rights' in C McCrudden and G Chambers (eds) *Individual rights and law in Britain* (1994) 301, 301, arguing that '[a]lthough it might be held that B has the right that A should promote B's welfare in accordance with A's conception of that welfare, such a right is really no right at all. A person who surrenders to another the power to determine where his own welfare lies has in a real sense abdicated his own personal autonomy'.

theory shares with the fiduciary model and paternalism the need to circumscribe autonomy at the point where its exercise becomes irrational and ceases to promote the reason for which autonomy rights are valued. This point has support from MacCormick's argument that it is wrong to presume that children, especially young children, are the best judges of what is good for them.¹⁷⁰

One of the shortcomings of the interest theory is that it is so broad that just about any interest can generate rights. Children can be held to have an interest in parental guidance or state intervention depending on the value placed on particular interests in a given society. It is quite possible to ascribe rights to a person in order to serve other people's interests and, yet, still insist that these rights spring from the right holder's interests.¹⁷¹ Thus, children may be said to have rights which serve adult interests. For instance, some scholars have written about children's right to autonomous parents to demonstrate that family privacy and parental autonomy serve the interests of the child.¹⁷² Further, there is no criterion for determining whether interests are sufficient reasons for imposing obligations on others. The interest theory does not explicitly say who is responsible for deciding whether an interest constitutes a legitimate ground for imposing on others the preemptory duty to protect and promote the right holder's interests.¹⁷³ Is it the state (including the courts), society, parents or the church?

On the whole, these limited rebuttals do not undo the importance of the interest theory for the protection and promotion of children's rights. The theory confers rights on children based on the latter's interests in particular things; lists the three types of interests which children broadly have; explains why autonomy interests should be limited if they are inconsistent with developmental or basic interests and imposes obligations on parents and the state to promote children's rights. The role of the state in the promotion of children's rights is explicitly recognised in three forms. First, the state plays a supportive role where parents do not have the resources needed to meet the

¹⁷⁰ MacCormick (note 142 above) 316, where the author argues that '[c]hildren are not always or even usually the best judges of what is good for them, so much so that that even the rights which are most important to their long term well being, such as the right to discipline, they regularly perceive as being the reverse of rights or advantages'

¹⁷¹ For a discussion on this point, see J Raz 'Rights and individual well-being' in J Raz (ed) *Ethics in the public domain: Essays in the morality of law and politics* (1994) 29, 37-40 and A Harel 'Revisionist theories of rights: An unwelcome defence' (1998) 11 *Canadian Journal of Law and Jurisprudence* 227, 233-43.

¹⁷² Goldstein, Freud and Solnit (note 44 above) 4.

¹⁷³ This problem is briefly discussed, along slightly different lines, by M Jones and LB Marks 'The dynamic developmental model of the rights of the child: A feminist approach to rights and sterilisation' (1994) 2 *The International Journal of Children's Rights* 265, 273.

child's basic interests. Second, the state appears to be solely responsible for providing services, resources and facilities necessary for the development of the child's capacity to exercise his or her rights. Third, both the state and parents have the duty to guide the child in exercising autonomy rights in the manner discussed above.

6 SOCIOLOGICAL THEORY

6.1 Definition and justification

Sociological theory, also commonly known as the sociology of childhood, is premised on the claim that childhood is not a natural and fixed state, but rather a process of continuous change.¹⁷⁴ It casts childhood not as a permanent, but rather a transitory phase out of which children grow to claim their place in the adult world. At the heart of this school of thought lies the idea that '[c]hildhood is a social convention and not just a natural state'.¹⁷⁵ Whereas classical sociological theory regarded children as 'immature, irrational, incompetent, asocial [and] acultural' persons having to learn from 'mature, rational, competent, social and autonomous' adults,¹⁷⁶ contemporary sociological theory views children not as mere reactors to social stimuli, but as both subjects with the capacity to initiate self-regulating interactions and agents capable of influencing decisions affecting them.

Sociological theory originates from the recognition that children have historically been viewed as passive recipients of adult wisdom and society's culture, and seeks to challenge the image of the child as an incompetent, irrational and immature individual who should be guided, 'acted upon, regulated, disciplined and determined'.¹⁷⁷ Depicting children as competent agents, sociological

¹⁷⁴ See generally H Cunningham *The Children of the Poor: Representations of childhood since the Seventeenth Century* (1991) 7.

¹⁷⁵ M Hoyles *Changing childhood* (1979) 23.

¹⁷⁶ R MacKay 'Conceptions of children and models of socialisation' in HP Dreitzel (ed) *Childhood and socialisation* (1973) 27, 28. For a summary of the traditionalist approach, see F Elkin *The child and society* (1960) 101; E Shildkrout 'Roles of children in urban Kano' in JS La Fontaine (ed) *Sex and age as principles of social differentiation* (1978) 109-10. Shildkrout observes that the traditional approach views 'child culture as a rehearsal for adult life and socialisation... [as] the process through which children are made to conform'.

¹⁷⁷ See A Turmel *A historical sociology of childhood: Developmental thinking categorisation and graphic visualisation* (2008) 22.

theory challenges the ‘naturalisation’ of youth incompetence and portrays childhood as a socially and culturally constructed mode of being in the world as opposed to a preparatory phase for entering into adult social life.¹⁷⁸ It hypothesises that the period we now call ‘childhood’ developed as a response to social and economic necessity rather than any flowering of compassion towards vulnerable and helpless children. The Industrial Revolution, sociologists argue, initially fuelled the demand for child labour, but as the need for an educated labour force rapidly grew; children were not only withdrawn from the labour force, but were confined to schools through compulsory education.¹⁷⁹ It was not until the Enlightenment era that the vulnerability and categorisation of children as a separate class became highly sentimentalised and notions of ‘good childhood’ emerged.¹⁸⁰ ‘Good childhood’, notes Edwards, ‘became increasingly focused on the nuclear family, the safety of life at home, the value of full-time education, and the passage from childhood innocence to a useful and active adult life’.¹⁸¹ When these goals achieved ‘normative’ status, all children living differently or somehow falling outside the bracket of ‘good childhood’ were pathologised and state agencies could intervene to protect their best interests.¹⁸²

These views have been replicated in African literature on the sociology of childhood. In the African context, it has been sufficiently demonstrated that the focus on group interests gives adults the opportunity to claim the labour power and time of weaker members of the family and to socialise children to submit to the authority of elders.¹⁸³ Historically, it is argued, this gave birth to the concept of ‘wealth in people’ to explain claims which individuals were permitted to make on other people’s time and resources.¹⁸⁴ Thus, the family head or the paternal family had rights in the person, labour time and the property of their children.¹⁸⁵ The family head had the

¹⁷⁸ Ibid, 23.

¹⁷⁹ See, for example, P Robertson ‘Home as a nest: Middle class childhood in nineteenth century Europe’ in L DeMause (ed) *The history of childhood* (1976) 407 and J Coleman *Foundations of social theory* (1990).

¹⁸⁰ E Bouding *Children’s rights and the wheel of life* (1979), xiii.

¹⁸¹ M Edwards ‘New approaches to children and development’ (1996) Vol 8(6) *Journal of International Development* 813, 815-16.

¹⁸² J Ennew, *Street and working children: A guide to planning*, London: Save the Children Fund (1994a).

¹⁸³ See RS Rattray *Ashanti law and constitution* (1956) 13 and H Kuper *Kinship among the Swazi* (1962) 96.

¹⁸⁴ For a detailed explanation of these ideas, see M Gluckman ‘Property rights and status in African traditional law’ in M Gluckman (ed) *Ideas and procedures in African customary law* (1996) 252-65.

¹⁸⁵ B Rwezaura, A Armstrong, W Ncube, J Stewart, P Letuka, P Musanya, I Casimiro and M Mamashela ‘Parting the long grass: Revealing and reconceptualising the African family’ (1995) 35 *Journal of Legal Pluralism* 25, 32-33; and JAM Cobbah ‘African values and the human rights debate: An African perspective’ (1987) 9 *Human Rights*

right to create relationships of obligation and dependency with subordinates as a way of ensuring personal security during old age and group survival after death.¹⁸⁶ Accordingly, the sociology of childhood is a direct response to the subjection of children to adult authority.

6.2 Historical origins and gradual development

Besides the work of other influential authorities of the 1960s, the main driver of sociological conceptions of childhood appears to have been the writings of Phillip Aries. Aries argued that in medieval society, childhood did not exist as people were unaware of the distinction between childhood and adulthood.¹⁸⁷ In his *Centuries of Childhood*, Aries categorically makes this claim in the following terms:

In medieval society the idea of childhood did not exist; this is not to suggest that children were neglected, forsaken or despised. The idea of childhood is not to be confused with affection for children: it corresponds to an awareness of the particular nature of childhood, that particular nature which distinguishes the child from the adult, even the young adult. In medieval society this awareness was lacking. That is why, as soon as the child could live without the constant solicitude of his mother, his nanny or his cradle-rocker, he belonged to adult society.¹⁸⁸

Aries' central claim is not that children have not existed in the past, but to emphasise that adult society historically viewed children differently and children themselves experienced childhood differently from the way they experience it today. Childhood hardly lasted beyond infancy and, on reaching the age of five or seven years, the child was integrated into the world of adults.¹⁸⁹ This practice lasted for a long period of time among the lower classes.¹⁹⁰ Nearly 10 years later, Illich would also claim that the construction of the period of '[c]hildhood as distinct from infancy, adolescence or youth was unknown to most historical periods...the peasant's child and the nobleman's child all dressed and played as their Fathers'.¹⁹¹ Jenks interprets the writings of

Quarterly 309, using the idea of 'wealth in people' to explain claims which adults are permitted to make on children's labour power, time and resources.

¹⁸⁶ C Bledsoe *Women and marriage in Kpelle society* (1980) 55.

¹⁸⁷ P Aries *Centuries of childhood* (1962) 37 and 128.

¹⁸⁸ Ibid, 128.

¹⁸⁹ Ibid, 369.

¹⁹⁰ Ibid.

¹⁹¹ I Illich *Deschooling society* (1971) 33.

Aries to mean that children were, before the end of the Middle Ages, invisible. Until then, 'there was no collective perception of children as being essentially different to anyone else' and every individual's status was not determined by age or physical maturity.¹⁹² Later authorities would also point out that the notion of childhood was disappearing and that there was, as a result, a movement to ensure that children's legal rights were more or less similar to those of adults.¹⁹³

The sociology of childhood seeks to recognise the separate personhood of the child, to promote the idea that children are persons in their own right and to emphasise that children are not mere appendages to their parents or objects of social control. Harding once highlighted the need for children to be studied as persons 'in their own right, and not just as receptacles of adult teaching'.¹⁹⁴ Moreover, sociological theory seeks to promote the idea that children should be treated as individuals instead of being categorised as members of a single, uniform and undifferentiated class.¹⁹⁵ It perceives children as individual social actors and citizens with an active participatory role in the family and social life.¹⁹⁶ According to this school, 'the child is active in its own right, not simply imitatively, but as...an agent in its own construction and as naturally an agent as any adult, in the sense of agency that concerns the initiation of action by choice'.¹⁹⁷ Sociologists stress the idea that the child is a social actor with his or her own perspective about life issues.

Sociological theory posits that children should be allowed to construct their own worldviews, to participate in decision making and to determine their own destiny. Thus, children should not be viewed as 'passive subjects of social structural determinations'.¹⁹⁸ Drawing inspiration from

¹⁹² C Jenks *Childhood* (2005) 55.

¹⁹³ N Postman *The disappearance of childhood* (1994) 120. See also S Stephens (ed) *Children and the politics of culture* (1995) also refers to 'discourses of lost, stolen and disappearing childhoods' and the portrayal of 'the domain of childhood as threatened, invaded and "polluted" by adult worlds'

¹⁹⁴ See S Harding 'Can there be an anthropology of children?' (1973) 4 *Journal of the Anthropological Society of Oxford*, 85, 99.

¹⁹⁵ See KE Knutson *Children: Noble causes or worthy citizens* (1997) 3, who argues that '[t]he dominant perception, which is increasingly becoming a standard notion of childhood throughout the world, is an extension of a romanticised Western view which regards children as essentially isolated from the rest of society'.

¹⁹⁶ N Taylor, P Tapp and M Henaghan 'Respecting children's participation in family law proceeding' (2007) *International Journal of Children's Rights* 61, 67.

¹⁹⁷ M Wartofsky 'The child's construction of the world and the world's construction of the child: From historical epistemology to historical psychology' in FS Kessel and AW Siegel (eds) *The child and other cultural inventions* (1981) 188, 199.

¹⁹⁸ A James and A Prout (eds) *Constructing and reconstructing childhood* (1990) 4.

Giddens¹⁹⁹ and writing about growing up in South Africa, Burman observes that it would be wrong to view socialisation as the process through which only adults and society leave their mark on passive children because children themselves influence parents.²⁰⁰ Her aim is to demonstrate the social agency of children. Sociological theory recognises that there is considerable dissonance between the child's individual experiences of being a child and the institutional form that childhood often takes. It recognises that the childhood that is often constructed by society is nowhere closer to the actual childhood that is lived by the child as an agent and challenge adults to investigate and respect the ways in which children themselves construct their social worlds.²⁰¹

Sociological theory questions the use of ascriptive variables (such as immaturity and vulnerability) which portray children as human becomings (adults-in-the-making) rather than human beings (full persons living in the present). As social 'actors' and 'constructors' of personal projects, children should control their own activities, time and space.²⁰² Society should not define children as citizens of a second order. This calls for a departure, in discourses on children's rights, from repeated references to adults because children have their own conceptions of childhood.²⁰³ Children's time and how they use it is usually 'appropriated' by and to the benefit of adults who then 'take hold of children's time, organise it and curricularise it'.²⁰⁴ This is evidenced by the intense timetabling of childhood as a training and preparatory stage in the agent's life. Preschool, primary and secondary stages of learning are timetabled into periods for

¹⁹⁹ See A Giddens *Central problems in social theory: Action, structure and contradiction in social analysis* (1979) 130, who argues as follows:

The unfolding of childhood is not time elapsing just for the child: It is time elapsing for its parental figures, and for all other members of society; the socialisation involved is not simply that of the child, but of the parents and others with whom the child is in contact, and whose conduct is influenced by the child as the latter's is by theirs in the community of interaction. Since the newborn human infant is so helpless and so dependant on others, normally its parents, it is easily forgotten that children 'create parents' as well as parents creating children.

²⁰⁰ S Burman 'The contexts of childhood in South Africa: An introduction' in S Burman and P Reynolds (eds) *Growing up in a divided society: The contexts of childhood in South Africa* (1986) 1, 3.

²⁰¹ M Freeman 'The sociology of childhood' (1998) 6 *International Journal of Children's Rights* 433, 438.

²⁰² D Held 'Between state and civil society' in G Andrews (ed) *Citizenship* (1991) 19, 20, arguing that citizenship entails membership in the community and inclusion in matters of the community without discrimination based on, among others, race and gender.

²⁰³ J Ovortrup 'Childhood matters: An introduction' in J Ovortrup, M Bardy, G Sgritta and H Wintersberger (eds) *Childhood matters: Social theory, practice and politics* Vol 14 (1994) 1, 4-5.

²⁰⁴ J Ennew 'Time for children or time for adults?' in Ovortrup, Bardy, Sgritta and Wintersbeg (note 203 above) 125-43.

different disciplines and skills, together with recreation time, play time and holiday time.²⁰⁵ The development of the curricula, the boom in children's literature (books, stories and movies written by adults), schoolwork, homework and many other timetabled routines that now form part of normal education, are seen as attempts to control the time of children.²⁰⁶ Indeed, more homework means more time in the study room than the movie house, more time indoors than outdoors and less free or play time.

Adult control over children's time and space is often combined with control over the person of the child. There are times when the child must be strictly in the schoolroom, the playgrounds and the family home.²⁰⁷ This control over the child's space, time and person often introduces new and contemporary patterns of authority not necessarily based on ancient structures and notions. The sociology of childhood seeks to depart from this adult-oriented and pre-determined approach to children's lives and to emphasise the notion that children should be in control of their space, time and actions.²⁰⁸ It constructs children's culture 'as a counterculture of a subordinate age group, based on mechanical solidarity, a similarity of age, and position, in opposition to the adult world'.²⁰⁹ It recognises that the radius of the child's 'effective life space' should be permitted to widen with the age of the child. This broadens the space and the opportunities for the child to develop a well-rounded personality.²¹⁰ The sociology of childhood requires adults to give children the opportunity to air their grievances, to articulate what they perceive as wrongs done to them and to describe to adults the world as they understand it. This provides a platform for

²⁰⁵ See for instance P Meyer *The child and the state: The intervention of the state in family life* (1983) 11, stating as follows:

School...timetables occupy the child's whole day; its programmes encourage indirect knowledge to the detriment of experience even where practical training is concerned; its discipline defines the ideal behaviour of a child in terms of passivity and blind obedience under an educational system of intimidation.

²⁰⁶ L Chisholm, P Buchner, HH Kruger and P Brown (eds) *Childhood, youth and social change: A comparative perspective* (1990) 7, stating that 'children's lives are busier chasing credentials in ever-expanding areas of their experience. Time and space come to be used and controlled differently, which in time affects the children's relationship with parents, other adults and peers'.

²⁰⁷ A James 'Doing nothing': Categories of experience' (1982) Issue 2 *North East Local Studies: The question of unemployment*, 29, stating that 'the playground is separated from the schoolroom, the rest from the office, working hours from leisure hours'.

²⁰⁸ See D Leonard 'Persons in their own right': Children and sociology in the UK' in L Chisholm, P Buchner, HH Kruger and P Brown (eds) *Childhood, youth and social change: A comparative perspective* (1990) 58-70.

²⁰⁹ I Frones 'Dimensions of childhood' in Qvortrup, Bardy, Sgritta and Wintersbeg (note 203 above) 145, 157.

²¹⁰ J Kovarik 'The space and time of children at the interface of psychology and sociology' in Qvortrup, Bardy, Sgritta and Wintersbeg (note 203 above) 101, 109-10.

understanding children as agents with voices and projects constructed in their own social worlds.²¹¹

Sociologists have made compelling arguments on why, to a large extent, the concept of ‘being a child’ is always a shifting social construction.²¹² This means that while young children’s immaturity is a natural biological fact, childhood (the way in which this immaturity is perceived, acted upon and made meaningful) is neither a natural nor universal characteristic of human groups, but a product of context, constant contestation, culture and socialisation.²¹³ Childhood is a social construction in terms of which individuals and interest groups contest for the power to control the lives of children.²¹⁴ Thus, the very meaning and duration of childhood are contested terrains. In Freeman’s words, ‘much depends on what is understood by being an adult’, for arguments that are used to deny children certain rights can equally be used to deny adults the very same rights.²¹⁵

Childhood is a political issue. Family and societal questions about what children need, how they should develop, who should take care of them and at what stage, at what age should they be in school and to what level, when should they begin exercising relative autonomy from adults and in what areas, what level of parental guidance is appropriate for children of certain age categories, are essentially political theories (not facts) which derive from adult experiences.²¹⁶ They emerge from adult studies of childhood and reflect adult desires to respond to certain cultural, social and economic forces or needs. The political and changing nature of childhood means that it can be manipulated, limited or extended, by adults, to achieve certain goals for the benefit of parents or society as a whole.

²¹¹ A. James, C Jenks and A Prout *Theorizing childhood* (1998) 69.

²¹² See J Ovortrup ‘Childhood matters: An introduction’ in Qvortrup, Bardy, Sgritta and Wintersbeg (note 203 above) 1-23.

²¹³ See A Solberg ‘Negotiating childhood: Changing constructions of age for Norwegian children’ in James and Prout (note 198 above) 126-44.

²¹⁴ See generally A Wilson ‘The infancy of the history of childhood: An appraisal of Philippe Aries’ (1980) 19 *History and Theory* 132-54; L Pollock, *Forgotten Children: Parent-Child Relations 1500-1900* (1983) and K Hultqvist ‘Changing rationales for governing the child’ (1997) 4 *Childhood* 405-24.

²¹⁵ See M Freeman *The rights and wrongs of children* (1983) 1.

²¹⁶ See B Mayall ‘The sociology of childhood in relation to children’s rights’ (2000) 8 *The International Journal of Children’s Rights* 243, 244-45 and M Woodhead ‘Reconstructing developmental psychology – Some first steps’ (1999) 13 *Children and society* 3, 4-5.

Sociological theory seeks to avoid universalising approaches to childhood and requires sensitivity to the particularities of every child in the implementation of laws and policies. The fact that childhood is socially constructed means that there is no single, but many ‘childhoods’ in the sense that there are not universal and cross-cultural parenting practices exercised in the same way in all communities.²¹⁷ Thus, understanding the child’s condition requires the consideration of such important factors as gender, race and ethnicity, social origin, disability, education and cultural identity. More importantly, however, sociological theory and cross-cultural developmental psychology recognise that these factors determine every child’s capacity for rational autonomy (a contested concept itself).²¹⁸ In this respect, it has been noted that the concept of ‘being a child’ is undoubtedly a culture-bound determination.²¹⁹

These remarks have wide-ranging implications for the way in which child-parent-state relations are perceived in diverse communities. Woodhead argues that ‘the implication of accepting that child development has to be understood as a cultural process is that benchmarks are not intrinsic, fixed or prescribed. They are extrinsic, historically specific and negotiable within a framework of promoting children’s rights’.²²⁰ In communitarian communities, families and society (through activities supportive of social engagement) encourage children to develop behaviours that promote communitarianism and group solidarity.²²¹ In many African countries, including South Africa, the majority of children are socialised along the communitarian model of family relations and view certain collective duties, including the performance of work that may today be labelled ‘child labour’, as an essential part of training towards competent adulthoods.²²²

²¹⁷ See generally P Light ‘Context, conservation and conversation’ in M Richards and P Light (eds) *Children of social worlds* (1986) 170, 170, writing about the dominance of universalising discourses in the last quarter of the 21st Century.

²¹⁸ See generally M Scaller et al *Evolution, culture and the human mind* (2010); JM Lucariello et al *The development of the mediated mind: Sociocultural context and cognitive development* (2004) and ME Graue *Studying children in context: Theories, Methods and ethics* (1998).

²¹⁹ See Ncube ‘The African cultural fingerprint?’ in W Ncube (ed) *Law, culture, tradition and children’s rights in Eastern and Southern Africa* (1998) 11, 11-12 and JS Bruner *Processes of cognitive growth: Infancy* (1968) 2, who argues that cognitive ‘growth cannot be understood without reference to human culture and primate evolution’.

²²⁰ M Woodhead ‘Children’s rights and children’s development: Rethinking the paradigm’ in E Verhellen (ed) *Understanding children’s rights: Collected papers presented at the Fifth Interdisciplinary Course on Children’s Rights* (2000) 121.

²²¹ See JA Robinson “‘What we have got here is a failure to communicate’: The cultural context of meaning’ in J Valsiner (ed) *Child development within culturally structured environments*, Vol 2 (1988) 137, 193.

²²² Boyden argues that the Western dominated construction in which work is labelled ‘child labour’, pathologises the reality of childhood for the majority of children for whom work is an integral part of their lives. See J Boyden ‘A comparative perspective on the globalisation of childhood’ in James and Prout (note 198 above) 190-230.

6.3 Critical appraisal

Sociological theory has made numerous positive contributions to the reconstruction of childhood and the recognition of children's rights. First, the idea that children are social agents and initiators of action by choice, is central to the recognition of child participation and autonomy rights. It recasts the parent-child-state relation in terms of children's capacity for rational action rather than the child's immaturity and incompetence. This is related to the concept of the child's separate personhood and emphasises that children are 'full' human beings, not some creatures that will acquire humanity on attaining the age of majority or consent. This remodels the approach to rights alongside children's own perspectives rather than the perspectives of adults and ensures that the adequacy or desirability of children's actions are not measured against those of the complete, static and idealised rational adult.

Second, sociological theory recognises that theoretical approaches (to childhood) that are solely driven by the need to protect and provide for children can be a recipe for the exclusion of children from the decision-making processes. Protectionist approaches largely cast children as beneficiaries of other people's charitable actions instead of bearers of enforceable rights and initiators of action. Sociological theory recognises that the traditional emphasis on children's welfare rights usually reinforces stereotypical images of child protection over autonomy, dependence over independence and nurturance over self-determination.²²³ To this end, sociological theory challenges the construction of childhood as a 'protectionist experience' in terms of which there is limited autonomy and responsibility for personal actions, but rights to protection.²²⁴ By emphasising the active role children should play in determining how to use their time and space, the sociology of childhood challenges the idea that adults always know what is best for children and seeks to promote the latter's participation in the construction of what it means to be a child.

²²³ In Kleinig's words, 'a morality which has as its motivation *merely* the giving of what is due or what is conducive to the greatest all-round utility, is seriously defective'. See J Kleinig 'Mill, children and rights' (1976) 8 *Educational Philosophy and Theory* 1, 14.

²²⁴ See J Ennew *The sexual exploitation of children* (1986) 21.

Third, the idea that childhood is a socio-cultural construction is very important in recognising the way in which social goals and cultural values shape the child's view of the world. This is important in the South African context where the majority of children feed on communitarian ideologies and view autonomy not as an end goal of human development. Indigenous African communities are built on the four principles of respect, restraint, responsibility and reciprocity.²²⁵ Under this conception, the interests of the child and those of the community are symbiotic. Hence, the preservation of group identity is thought to be in the interests of the child and the interests of the family. The child stands not as an individual but as a family member; she serves the family and the family serves her.

Since the family is a resource for the child, it is thought in her interests for her to support it and to maintain family bonds.²²⁶ Given that sociological theory overemphasises the importance of tradition and social context in shaping individuals and their relationships, it risks further marginalising perspectives of disempowered groups – women and children – that have not historically had strong political representation. This problem is acute in Africa's communitarian societies where women and children are socialised to be differential and submissive to patriarchal attitudes, values and priorities largely articulated by men.²²⁷ Whilst it recognises the importance of culture in shaping children's conceptions of the world, sociological theory overlooks the fact that adults are custodians of cultural values and often transmit these values to their children.²²⁸

²²⁵ For a detailed discussion of reciprocal support obligations, respect and restraint, see BA Rwezaura 'Changing community obligations to the elderly in contemporary Africa' (1989) 4 *Journal of Social Development in Africa* 5; A Twum-Danso 'Reciprocity, respect and responsibility: The 3Rs underlying parent child-child relationships in Ghana and the implications for children's rights' (2009) 17 *International Journal of Children's Rights* 415; NA Apt 'Ageing and the changing role of the family and the community: An African perspective' (2002) 55 *International Social Security Review* 39 44; NA Apt & M Grieco 'Urbanisation, caring for elderly people and the changing African family: The challenge of social policy' (1994) *International Social Security Review* 111-22; TN Nhongo 'Impact of HIV/AIDS on generational roles and intergenerational relationships' paper presented at the workshop on HIV/AIDS and Family Wellbeing, Namibia, 28-30 January 2004 and E Goody *Context of kinship: An essay in the family sociology of the Gonja of Northern Ghana* (1973).

²²⁶ A Armstrong *A child belongs to everyone: Law, family and the construction of the best interests in Zimbabwe* (Innocenti Occasional Papers, Child Rights Series 11, 1995) 5.

²²⁷ See generally A Moyo 'Reconceptualising the 'paramountcy principle': Beyond the individualistic construction of the best interests of the child' (2012) 12 *African Human Rights Law Journal* 141, 154-55.

²²⁸ Vygotsky observes that childhood speech is neither personal nor egocentric but is essentially *social* and communicative in both origin and design. In his 'general law of cultural development', Vygotsky proposes that any higher psychological function appears 'twice or on two planes. First, it appears on the social plane and then on the psychological plane. First, it appears between people as an interpsychological category and then within the individual child as an intrapsychological category'. Vygotsky argued that there is a gap – zone of proximal

However, sociological theory tends to emphasise children's capacities for rational action and to underestimate the role played by adults in mediating the optimal development of the very young. It largely and wrongly portrays adult control and guidance as an impediment to children's optimal development. This is ironic, given the theory's acceptance of the idea that culture and context play an important role in the child's mental and social development. Many lessons can be learnt from cross-cultural developmental psychology in this respect. Developmental psychology recognises that the goals of child development vary across time (and place) and are often inextricably linked to socio-economic needs than objective assessments of children's capacity to reason.²²⁹

Different child development goals influence not only the ways in which parents structure the child's environment and the outcomes children can achieve, but also the responsibilities entrusted to children.²³⁰ Equally important here is the way in which 'those responsible for the upbringing of children ensure that they acquire the particular shared meanings, values and preferred behaviours of the group'.²³¹ Super and Harkness argue that children's environments influence their development through (a) the physio-social settings they inhabit (family context and social patterns); (b) the culturally regulated customs and child-rearing practices and (c) the beliefs and ethno-theories of the parents.²³² These observations confirm not only the socially constructed nature of childhood, but the strong link between children's mental development, parental influence and social expectations.

development (ZPD) – between what children can and cannot achieve with or without assistance of those who are masters in their fields – the more knowledgeable others (MKO). He defined the ZPD as 'the distance between the actual development level as determined by individual problem solving and the level of potential development through problem solving under adult guidance or in collaboration with more capable peers'. See L Vygotsky *Mind in society: The development of higher psychological processes* (1978) 57, 86 and 90; L Vygotsky *Thought and language* (1986) Chapter 2 and KS Kublin et al 'Pre-linguistic dynamic assessment: A transactional perspective' in AM Wetherby et al (eds) *Transitions on pre-linguistic communication* (1989) 285, 287.

²²⁹ See G Lansdown 'The evolving capacities of the child', UNICEF Innocenti Research Centre, Florence (2005) 9-13, and J Valsiner 'Organisation of children's social development in polygamic families' in J Valsiner (ed) *Child development in cultural context* (1989) 67, 74-75.

²³⁰ See T Kindermann and J Valsiner 'Research strategies in culture-inclusive developmental psychology' in Valsiner (note 229 above) 13, 30-35.

²³¹ EB Wilson-Oyelaran 'Towards contextual sensitivity in developmental psychology: A Nigerian perspective' in Valsiner (note 229 above) 51, 58.

²³² C Super and S Harkness 'Cultural perspectives on child development' in D Wagner and S Stevenson (eds) *Cultural perspectives of child development* (1982) 170-98.

Parent-child relationships are often structured by developmental tasks.²³³ Targeted at the achievement of a specific competence at a given developmental point,²³⁴ these tasks or responsibilities are products of particular cultures which stipulate the appropriate age, sequence and process of accomplishment.²³⁵ Further, these responsibilities organise parent-child relations by either reducing the force of inter-individual difference and environmental factors or by influencing the degree to which children show dependent and independent behaviour.²³⁶ Developmental tasks are strongly connected to children's goals and parental expectations as prescribed by cultural guidelines on how and when they should proceed.²³⁷ Kindermann and Skinner observe that 'the variability between different cultures in belief systems about early competencies of the child should result in actual differences in the onset, process and achievement of competencies, presumably mediated by differences in training practices stemming from these beliefs'.²³⁸ Thus, the idea that children are not imitators, but independent initiators of action negates parental or social influences on children's acquisition of particular competences at certain stages in their development. The solution to the historical exclusion lies not in giving children absolute autonomy from parents, but in recognising children's capacity for rational action and acknowledging the importance of paternalism in certain contexts.

Finally, the sociology of childhood does not enumerate what the duties of parents and the state are in promoting children's rights. It implies that the mere fact of recognising that children are initiators of action and active participants in socio-political discourses on human rights, is in itself enough to enable children to exercise their rights. There is, to a larger extent, failure to identify the bearers of the duties that are created by children's rights, even participation rights. The only obligation that comes to the fore seems to be the duty to respect children's capacity for

²³³ See EM Duval *Family development* (1971) 51, defining 'family developmental tasks' [as] 'those growth responsibilities that must be accomplished by a family at a given stage in development... if the family is to continue as a unit' and RJ Havighurst *Developmental tasks and education* (1972) 2, who defines developmental tasks as 'tasks which arise at a certain period in the individual's life, successful achievement of which leads to...success with later tasks while failure leads to individual unhappiness, disapproval by society and difficulty achieving later tasks'.

²³⁴ Developmental tasks emerge out of three sources: biological changes, socio-cultural norms and individual expectations or values.

²³⁵ See J Valsiner *Culture and the development of children's action: A cultural historical theory of developmental psychology* (1986) 207, arguing that cultural socialisation goals are 'already coded into the fixed-feature objects that surround children'.

²³⁶ T Kindermann and EA Skinner 'Developmental tasks as organisers of children's ecologies: Mothers' contingencies as children learn to walk, eat and dress' in Valsiner (note 221 above) 66, 71.

²³⁷ Ibid, 94-95.

²³⁸ Ibid, 95.

rational autonomy (even if the child in question does not have such capacity, it seems). This failure to identify duty holders is coupled by an implicit disregard of the indivisibility of children's rights. Thus, the focus on social agency and autonomy is largely exclusive and not in way tied to the need for parents and the state to provide the resources needed for optimal health, education, intellectual development and effective participation.

7 CONCLUSION

Of all the theories described in this chapter, the property theory has nothing to contribute to a meaningful theory of children's rights. This is because it treats children as objects to be left at the mercy of their parents and as means to the achievement of their parents' ends. Children are not commodities to be sold, destroyed, exploited or donated at the parent's whim, but holders of rights to protection, provision and participation. The fiduciary model and paternalism explain the parent-child relationship better than the property theory. Under the fiduciary model, children have rights to have their welfare enhanced and an argument could be made that partial control of the trust should be ceded to the principal as and when they acquire the capacity to manage the trust. The model is good in explaining the need for state intervention when parents fail to display reasonable care and due diligence in the performance of their duties as trustees, but the theory is weak in explaining how the child comes to have rights, especially against the state. Further, the notion of hypothetical consent is an unnecessarily complex concept in explaining the importance of adult paternalism over children.

Nonetheless, the fiduciary model and the theory of paternalism both accept that there is need for parental control over a child who does not have the capacity to exercise rights without supervision. Paternalism does this more directly and should be commended for that, particularly in light of calls for child autonomy from liberal philosophers. More importantly, both the fiduciary model and paternalism are right in stipulating that a theory of children's rights should recognise that children need protection and parental care because they are physically vulnerable and generally lack the capacities for rational autonomy.

However, the fiduciary model and paternalism collapse at the point of promoting children's participation and autonomy relative to the child's age and capacity. Despite his insistence that the rigour of parental control be relaxed to allow children relative autonomy, Locke himself expected parental control to cease when the child became a major. Thus, while both theories are correct to insist that children cannot be abandoned to full autonomy before attaining adulthood, they are equally wrong in implying that the very young and adolescents on the verge of maturity need the same levels of protection. Two suggestions have been made to improve the strength of the fiduciary model and paternalism. First, it has been suggested that since the fiduciary model already recognises the importance of an individual's age and developing competences for the individual's autonomy from control by others, this idea should be explicitly extended to those under the age of majority. Second, Freeman's attempt to liberalise paternalism enhances the recognition of the child's developing capacities and creates conditions to be met for paternalism to be justifiable. These conditions go a long way in qualifying these theories and giving children space for participation in decision-making.

The interest theory of rights is perhaps the most defensible theory of human rights, but is not particularly concerned with children's rights. The strength of the interest theory lies in not requiring the possession of full capacity as a pre-requisite for the exercise of rights; the extension of rights to all children; the recognition of various interests as grounding different rights; the implicit recognition of the fact that rights should be exercised in a manner consistent with the evolving capacities of the child; the principles on how competing interests are to be ranked and how parents or the state should make decisions in light of the importance of different types of interests. A defensible theory of children's rights should have all these principles. It should also recognise, in the language of sociological theory, that children are not appendages of their parents and have goals of their own, that they are not passive objects of adult work but active social agents and bearers of rights, that they are initiators of action who are capable of making certain decisions and that the stages at which children acquire competences to do certain things are partially culturally determined and vary from place to place. Finally, such a theory should depart from sociological theory and borrow from the fiduciary model and paternalism the much clearer idea that adults are entitled to restrict the autonomy of children who lack the capacity for rational action.

CHAPTER THREE: CHILDREN'S RIGHTS, PARENTAL RESPONSIBILITY AND STATE INTERVENTION IN INTERNATIONAL LAW

1 INTRODUCTION

Chapter Two discussed four theoretical models that possibly ground the concept of children's rights. It concluded that whilst the fiduciary model, paternalism and the interest theory of rights offer possible explanations of the nature of the child-parent-state relationship, the property theory should be discarded because it treats children as 'objects' of parental power. This chapter discusses the concept of children's rights in international law and examines the ways in which the theories discussed in Chapter Two have influenced international legal conceptions of rights. The two sections which follow this introduction explore, respectively, the historical development of children's rights in international law – from the Geneva Declaration to the Convention on the Rights of the Child – and explains the significance of the Convention on the Rights of the Child (CRC)¹ for the enjoyment by children of their rights. According to the Committee on the Rights of the Child, the treaty body tasked with monitoring the implementation of the CRC, the realisation of children's rights revolves around four general principles which must be respected when developing legislative, administrative and other measures to promote children's rights. In the fourth section, this chapter discusses the meaning and scope of these general principles and their implications for the triangular relationship between the parent, the child and the state.

In international human rights law, children's rights have been divided into three (sometimes four) broad categories. These include provision or socio-economic rights; protection rights; and participation or empowerment rights.² In the fifth section, this chapter discusses these categories of rights and investigates how each category deals with the relationship between the child, the

¹ United Nations Convention on the Rights of the Child, GA Res 44/25, annex, 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49 (1989) entered into force 2 September 1990 (hereafter the CRC). This chapter also makes frequent reference to the regional instrument on children's rights; namely the African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990) entered into force 29 November 1999 (hereafter the African Children's Charter).

² See, for example, P Alderson *Young children's rights: Exploring beliefs, principles and practice*, 2 ed (2008) 17.

parent and the state. However, the general approach taken in this chapter, and the whole thesis, is that children's rights are interrelated, indivisible and mutually reinforcing.³ To understand how international law resolves the tension between child participation rights and the parental right to guide and protect children, it is necessary to consider the CRC's approach to different categories of rights and the linkages that exist between them. This approach echoes the Committee on the Rights of the Child's observation that the CRC is to be applied holistically, 'taking account of the principle of the universality, indivisibility and interdependence of all human rights'.⁴

As shown in Chapter Two, children should not be given complete freedom to decide which rights to exercise and when, because they generally lack the deliberative capacities that are needed for sound judgment.⁵ Thus, children have the right to be protected from external harm and from themselves, and parents have the right and duty to protect children both from others and from personal decisions that may impair the child's development into a rational adult. In section six, this chapter addresses the tension between child participation rights and the family's (or rather parents' or legal guardians') responsibility to protect the child from personal decisions that are not in the child's best interests. As discussed below, this tension replays the broader tension between protection and participation rights. Thus, this section discusses the tension between protection and participation rights; explains how this tension arises and ought to be resolved under the provisions of the CRC.

³ See also Committee on the Rights of the Child, General Comment No. 7 'Implementing child rights in early childhood' CRC/C/ GC/7 (2005) (hereafter CRC General Comment 7) para 3, stipulating that 'the Convention on the Rights of the Child is to be applied holistically in early childhood, taking account of the principle of the universality, indivisibility and interdependence of all human rights'.

⁴ See CRC General Comment 7, para 3. See also the Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna 14-25, UN DOC. A/CONF.157/23 (1993), Part 1, para 5, observing as follows:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

⁵ See sections 3.1-3.3, 4.1-4.3 and 5.1-5.3 of Chapter Two.

2 THE HISTORICAL DEVELOPMENT OF CHILDREN'S RIGHTS IN INTERNATIONAL LAW

Philosophically, the adoption of the CRC symbolises the gradual change from social constructions of the child as no more than an 'object' of parental love, care and control. It mirrors the revolution that occurred in the 20th Century when children ceased to be seen as property items that were totally subservient to the authority of the father and the family. This theoretical development coincided with the increasing tendency of states to take a more active role by intervening in family affairs to curb child abuse and exploitation by parents.⁶ The driving force behind these developments appears to have been the gravity of intolerable human suffering during the two World Wars and the degree to which these wars revealed the special vulnerability of children. By the early 20th Century, the special vulnerability of children had given rise to the philanthropic concern to save children, the establishment of reformatories and industrial schools as alternatives to prison for children in conflict with the law.⁷

Nonetheless, the first tangible step towards the protection of children's rights under international law goes back to 1924 when the now defunct League of Nations adopted the Declaration of the Rights of the Child (commonly known as the Geneva Declaration).⁸ The Geneva Declaration codified five resolutions which impose on adults various duties to ensure the fulfillment of its goals. The language of all provisions of the Declaration suggests that children were still seen as helpless 'objects' that solely relied on adults for protection.⁹ The notion of rights against parents and the state had not fully emerged as there is no reference to the word 'right' in all the

⁶ For a detailed analysis of these developments, see WH Bennett, Jr, 'A Critique of the Emerging Convention on the Rights of the Child' (1987) 20(1) *Cornell International Law Journal* 12, 15; CP Cohen, SN Hart and SM Kosloske, 'The UN Convention on the Rights of the Child: Developing an Information Model to Computerise the Monitoring of Treaty Compliance' (1992) 14(2) *Human Rights Quarterly* 219-31 and OC Ruppel 'The protection of children's rights under international law from a Namibian perspective' in OC Ruppel *Children's rights in Namibia* (2009) 53, 55-57.

⁷ See generally D Platt *The Child Savers* (1989); BC Feld *Bad Kids: Race and the Transformation of the Juvenile Court* (1999) 51 and A Moyo 'Balancing the best interests of the child and the interests of society when sentencing youth offenders and primary caregivers in South Africa' (2013) 29(3) *South African Journal on Human Rights* 314, 318.

⁸ Geneva Declaration of the Rights of the Child of 1924, adopted Sept. 26, 1924, League of Nations O.J. Spec. Supp. 21, at 43 (1924).

⁹ For detailed discussions on the Geneva Declaration, see PE Veerman 'The international consensus' in PE Veerman *Rights of the child and the changing image of childhood* (1992) 155, 155-66 and E Jebb *International responsibilities for child welfare* (Save the Children Union, 1927) 6.

resolutions of the Geneva Declaration and it is not precisely clear who bears the duty to implement the resolutions set forth therein. The Geneva Declaration was intended to be a precursor to an international instrument containing legally binding norms, but the fall of the League of Nations temporarily halted any movement in that direction.

In 1959, the UN General Assembly adopted the Declaration of the Rights of the Child. The 1959 Declaration is an extended version of its predecessor and contains 10 principles addressing different facets of the child's life. It directly imposes on parents, individuals, voluntary organisations, local authorities and national governments the duty to recognise the rights set forth therein and to strive for the observance of these rights.¹⁰ At the time of its adoption, social attitudes about children appear to have been largely influenced by the property theory of rights. For instance, during the negotiations preceding the adoption of the Declaration, the French delegate insisted that 'the child was not in a position to exercise his own rights. Adults exercised them for children and in doing so were subject to certain obligations'.¹¹ Moreover, the Declaration does not define who a child is; leaving it to the authorities to decide who deserves the protection due to 'children'.¹² While the Declaration may have been important in raising consciousness about children's rights, it was merely a proclamation of principles devoid of any legally binding force. Further, apart from the right to non-discrimination in specific contexts, there is a striking disregard of children's civil and political rights in the Declaration. It is patent that the Declaration places 'an emphasis on the need to safeguard and protect the child, rather than to empower him or her'.¹³

The International Bill of Rights¹⁴ contains a bundle of rights that are applicable to both adults and children. The Universal Declaration of Human Rights (UDHR) proclaims that 'childhood

¹⁰ See the preamble.

¹¹ Juvigny in France (E/CN.4/SR.629) 9 and France (E/CN.4/SR.626) 10.

¹² See C Cassulo 'The Declaration of the Rights of the Child' (1955) XL *UN Secretariat News* (1) 11.

¹³ P Alston and J Tobin *Laying the foundations for children's rights: An Independent Study of some Key Legal and Institutional Aspects of the Impact of the Convention on the Rights of the Child* (United Nations Children's Fund, 2005) 5.

¹⁴ The International Bill of Rights consists of the Universal Declaration of Human Rights G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) (hereafter the UDHR), the International Covenant on Civil and Political Rights G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 (hereafter the ICCPR) and the International Covenant of Economic, Social and Cultural Rights

[is] entitled to special care and assistance’ and that ‘[a]ll children shall enjoy the same social protection’.¹⁵ The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were the first binding instruments to refer directly to children as holders of rights.¹⁶ A broad reading of the two international covenants suggests that children are entitled not only to rights entrenched in provisions which refer specifically to children, but also to all the rights that are protected therein.¹⁷ This is because the rights apply to ‘all members of the human family’, including children. In 1989, the Human Rights Committee noted that ‘the rights provided for in Article 24 are not the only ones that the Convention recognises for children and that, as individuals, children benefit from all of the civil rights enunciated in the Covenant’.¹⁸ Besides, the ICCPR and the ICESCR contain specific rights on children’s rights¹⁹ and the rights of the family.²⁰

Nonetheless, the International Bill of Rights focused primarily on the privacy of the family, the autonomy of parents in controlling children and the duty of the state to intervene only in cases of abuse, neglect and exploitation.²¹ It recognises the family as ‘*the* natural and fundamental group

G.A. res. 2200A (XXI), 21 U.N.GAOR Supp.(No.16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976 (hereafter the ICESCR).

¹⁵ Article 25(2) of the UDHR.

¹⁶ Paragraphs 1 and 2 of the Preamble of each Covenant recognise that ‘rights derive from the inherent dignity of the human person’ and that the ‘inalienable rights of *all* members of the human family’ are the foundation of a peaceful and just world.

¹⁷ See articles 2 of the ICCPR and 2 of the ICESCR binding States Parties to ‘respect and to ensure to *all individuals* within its territory and subject to [their] jurisdiction’ the rights entrenched in these instruments.

¹⁸ Human Rights Committee, General Comment No. 17: Article 24 (Rights of the Child) (1989) para 2.

¹⁹ Articles 14 and 10(3) of the ICCPR codify child-friendly measures in the juvenile justice context; article 23(2)-(4) of the ICCPR protects children against early and forced marriages and requires States Parties to take ‘necessary measures’ to ensure the protection of children post-divorce; Article 24(1) of the ICCPR codifies every child’s right to benefit from special protective measures without discrimination and imposes on the family, society and the state the duty to provide such services as are required by his status as a minor; article 24(2) and (3) protects the child’s rights to be registered and to have a name and nationality at birth; and article 10(3) of the ICESCR requires States Parties to take special measures to protect and assist children; to protect them from exploitation, from employment in work that is harmful to their health or dangerous to life or likely to hamper their normal development; and to set age limits below which the paid employment of child labour should be prohibited and punishable by law.

²⁰ Article 10(1) of the ICESCR requires States Parties to provide ‘[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children’ and article 23(1) of the ICESCR recognising the family as ‘*the* natural and fundamental group unit of society’ which is entitled to protection by society and the State.

²¹ In CCPR General Comment 17, para 6, the Human Rights Committee stated that ‘in cases where the parents and the family seriously fail in their duties, ill-treat or neglect the child, the State should intervene to restrict parental authority and the child may be separated from his family when circumstances so require’.

unit of society' which is entitled to protection by society and the State.²² The ICESCR follows this approach and requires States Parties to provide '[t]he widest possible protection and assistance to the family, particularly for its establishment and while it is responsible for the care and education of dependent children'.²³ Apart from requiring parents to provide services that enhance the child's optimal development, these provisions imply that States Parties are duty bound to respect the autonomy of parents in controlling the child's moral and religious education in light of the parents' own convictions.²⁴ While children became rights holders under the ICCPR and the ICESCR, both instruments emphasised the need to protect children as a vulnerable class and conferred wide powers on parents to protect and care for their children.

Arguably, it was not until the proclamation of 1979 as the International Year of the Child that children began to be considered as persons with rights.²⁵ Van Bueren argues that despite the adoption, in the late 1960s and early 1970s, of binding international instruments in which children's rights received partial protection, '[i]n reality children continued to be perceived as the objects and not subjects of international law long after adults had been accorded subject status. Until 1979, the child's perspective was either absent or assumed to be co-terminus with that of adults'.²⁶ At the regional level, the year 1979 marked the adoption of the Declaration of the Rights and Welfare of the African Child.²⁷ The proclamation of 1979 as the International Year of the Child was preceded by a conference in Warsaw, Poland, out of which came a statement containing 21 principles on the legal protection of the rights of the child. This statement of principles was submitted to the Polish government, consequently expanded and submitted to the UN as part of Poland's input to the International Year of the Child. The Polish draft was to become the basis of the UN's discussions on a convention on the rights of the child. Against the background of profound differences between participating countries,²⁸ the discussions stretched

²² Articles 16(3) of the UDHR, 23(1) of the ICCPR and 10(1) of the ICESCR.

²³ Article 10(1) of the ICESCR.

²⁴ See article 18(4) of the ICCPR.

²⁵ The UN General Assembly, in Commemoration of the 20th Anniversary of the issuance of the 1959 Declaration, designated 1979 as the International Year of the Child.

²⁶ G Van Bueren 'The historical framework of the international documents on children' in G Van Bueren (ed) *International documents on children* (1993) xv, xv.

²⁷ Declaration on the Rights and Welfare of the African Child 1979 OAUDoc.CAB/LEG/24.9/49 (1990), *entered into force* Nov 29, 1999.

²⁸ Some of the reasons for the differences include the huge number of countries that participated in the drafting process; the cold war type of ideological differences between Western countries (which felt the draft was an

for a period of 10 years and the Convention on the Rights of the Child (CRC) was finally adopted in 1989.

3 THE SIGNIFICANCE OF THE CRC

Eight months after it had been opened for signature and ratification, the CRC came into force and only three countries have not, to date, ratified the instrument.²⁹ Although it does not suggest the full enjoyment by children of their rights,³⁰ the near-universal ratification of the CRC symbolises the international community's consensus on the nature and content of children's rights. The significance of the CRC partly lies in the fact that it portrays children as holders of rights and imposes on State Parties the duty to 'respect and ensure' to every child the rights set forth therein.³¹ In this way, the CRC breaks new ground in that it is the first global instrument entrenching rights that are specifically applicable to children. Part of the CRC's strength is that it offers special protection to children *qua* children, not just as members of the family or the societies in which they live. Under both the CRC and the African Children's Charter, the child is portrayed as an independent person entitled to rights emanating not from their relationships with others, but from their separate personhood as an individual. This means that the child is entitled to assert their rights against other persons, parents and the state.

aspirational collection of social, economic and cultural rights at the expense of civil and political rights) and the Eastern bloc (which emphasised the importance of social and cultural rights); the lack of a clear strategy and goal-driven work-plan; the volume of materials involved; and fundamental differences on the appropriate role, rights and duties of the child, parents and the state. For detailed discussions of these factors, see T Hammarberg 'A Convention for the future' in R Barnen (ed) *Making reality of children's rights* Final Report of the International Conference on the Rights of the Child (Stockholm, Sweden: Save the Children, 1989) 11, 12; T Hammarberg 'The UN Convention on the Rights of the Child and how to make it work' (1990) 12(1) *Human Rights Quarterly* 97, 98-101; CP Cohen, 'United Nations Convention on the Rights of the Child' (1990) 44 *The Review* 36, 37; J Ruiz-Gimenez 'The human rights of the child' (1993) 50 *The Review* 82, 83; and CP Cohen 'The role of nongovernmental organisations in the drafting of the Convention on the Rights of the Child' (1990) 12(1) *Human Rights Quarterly* 138, 139.

²⁹ These countries include the United States of America, Somalia and, lately, South Sudan.

³⁰ See, for example, K Annan *We the Children*, Report to the Children's Summit (2002) 12, observing that '[t]he idea of children's rights, then, may be a beacon guiding the way to the future – but it is also illuminating how many adults neglect their responsibilities towards children and how children are too often the victims of the ugliest and most shameful human activities' and UNICEF Press Release, 'First global meeting of independent human rights institutions for children', www.unicef.org/specialsession/activities/ihri-pr.htm (8 May 2002), stating that '[h]aving rights on paper means little or nothing when they are not known about or cannot be enforced. We can and must do better'.

³¹ Article 2(1) of the CRC.

The separate personhood of the child is reinforced by the fact that the CRC does not only confer on children rights to special protection, but also protects participation rights; thereby opening the door for children to assert their rights in judicial and administrative proceedings.³² Article 12 of the CRC protects the child's right to be heard in administrative and judicial proceedings, and article 42 of the CRC places States Parties under an obligation 'to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike'. Arguably, the cumulative effect of articles 12 and 42 is that the child is an individual with rights and must therefore be given an opportunity to defend their interests in all matters affecting them.³³ These provisions confer on children some conditional procedural capacity to assert their rights. In this respect, one scholar has noted that 'the transformation of the child from a passive "object" of measures of protection to an active subject of rights [is] one of the most significant contributions of the Convention to the international law of human rights'.³⁴ The CRC acknowledges that the recognition of children's rights involves more than the charitable provision of goods and services,³⁵ and should reflect a large measure of commitment on the democratic front.³⁶

Further, the CRC consolidates 'in one up-to-date global perspective' the rights of the child previously scattered in many treaties and non-binding declarations.³⁷ However, the CRC does not

³² See articles 12 and 42 of the CRC.

³³ This aspect is discussed in detail at section 4.4 below.

³⁴ D O'Donnell 'The Convention on the Rights of the Child: A challenge for UNICEF' (1992) 91(2) *Bulletin of Human Rights* 32.

³⁵ See, for instance General Comment No. 5 'General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)' CRC/GC/2003/5 (2003) (hereafter CRC General Comment 5), para 11, stating that the '[im]plementation of the human rights of children must not be seen as a charitable process, bestowing favours on children'.

³⁶ Pleading for increased political attention to children, Hammarberg, in an observation made just before the adoption of the CRC, observed as follows:

It isn't that children are forgotten. Politicians talk about them and want to be seen to care for them. Organisations are formed for the benefit of children. Funds are raised for projects to help children in need. From posters and cards we meet the eyes of tormented children, appealing for more contributions. *This is charity*. On a general level, everyone is in favor of children, but the rights of the child are not yet recognised. To recognise these rights means something more than to feel pity for them, to make them an object of patronising generosity.

See T Hammarberg 'A decade of campaigning for children's rights' in Barnen (note 28 above) 42 and T Hammarberg 'The rights of the child and the industrialised countries' in K Ekberg and PE Mjaavatt (eds) *Children at risk: Selected papers* (Trondheim: Norwegian Centre for Child Research, 1993) 296.

³⁷ Centre for Human Rights, *The Rights of the Child* (Fact Sheet No. 10) (Geneva, Switzerland: United Nations, 1990) 8 and FZ Ksentini 'The Convention on the Rights of the Child' (1992) 91(2) *Bulletin of Human Rights* 45.

just bring together rights referred to in other treaties. It contains in one instrument all categories of rights; from protection rights to participation and socio-economic rights. More importantly, it demonstrates that civil, political, social, economic and cultural rights can be protected in one instrument and have equal force in international law. This reinforces the indivisibility of human rights and introduces a break from the historical divide between social, economic and cultural rights, on the one hand, and civil and political rights, on the other.³⁸ In addition, the CRC is innovative in that it goes ‘beyond existing standards and practices’ in the context of the child’s rights to life, survival and development; to a name and nationality from birth; to safe adoption; to special protection from all forms of exploitation; drug abuse and child neglect, and to protection when in trouble with the law and as a member of an indigenous or minority group.³⁹

Finally, the importance of the CRC also lies in its potential to influence attitudinal, legislative, policy and practical changes at the domestic level. Since the CRC sets normative standards that are applicable to all States Parties, it has, through the process of incorporation, the potential to influence the letter and spirit of national constitutions and statutory laws. When incorporated into domestic legislation, the CRC becomes part of the law of the land and a standard reference document on children’s rights.⁴⁰ More importantly, it operates as a pressure device to be employed by child rights agencies that can ground their claims and activities on the duties imposed on States Parties by the CRC. Once a State Party ratifies the CRC, it becomes ‘vulnerable to internal pressures exerted by individuals and organisations’ that work for or with children.⁴¹ This pressure is important for the delivery of social services to children and may influence national policies, budgets and programmes affecting children. However, the CRC is not just a pressure device; it is also an educational tool in that it outlines the ways in which families, communities and the state may promote the normative standards protected in it.⁴²

³⁸ Authorities often point to the ideological tension of the Cold War years and separate adoption of the ICESCR and the ICCPR as evidence of the historical divide between different families of human rights.

³⁹ See United Nations Department of Public Information, *Convention on the Rights of the Child* (New York: United Nations, 1991) 3.

⁴⁰ See M Jupp ‘The UN Convention on the Rights of the Child: An opportunity for advocates’ (1990) 12(1) *Human Rights Quarterly* 130, 135.

⁴¹ See AG Mower Jr *The Convention on the Rights of the Child* (1997) 8.

⁴² N Cantwell ‘A tool for the implementation of the UN Convention’ in Barnen (note 28 above) 36, 37-39.

4 GENERAL PRINCIPLES OF CHILDREN'S RIGHTS

The Committee on the Rights of the Child has identified articles 2, 3, 6 and 12 of the CRC as containing general principles underpinning all the rights of the child. These articles enshrine the principles of non-discrimination; the best interests of the child; life, survival and development; and child participation. These principles should guide the effective implementation of children's rights in the public and the private spheres;⁴³ in particular all legislative, administrative and other measures adopted to promote the rights of the child at the domestic level. This section discusses the meaning, scope and implications of these principles for the triangular relationship between the parent, the child and the state.

4.1 Non-discrimination

Discrimination has been defined as 'any exclusion, restriction, treatment or preference based upon reasons such as...birth or any other social condition, and which aim at or result in invalidating or undermining the recognition, enjoyment or exercise of human rights and basic liberty of individuals under equal terms'.⁴⁴ Non-discrimination is one of the general principles of the CRC and is protected under article 2 thereof.⁴⁵ To ensure normative consistency with earlier international human rights instruments,⁴⁶ the CRC prohibits discrimination against children on the basis of the child's or parent's or guardian's 'race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'.⁴⁷ Contrary to earlier proposals to limit the scope of the principle of non-discrimination,⁴⁸ delegates finally decided to adopt a broader formulation of the relevant article.⁴⁹

⁴³ See CRC General Comment 5, paras 12 and 22.

⁴⁴ See Human Rights Committee, ICCPR General Comment 18 'Non-discrimination' (1989) para 7.

⁴⁵ See article 2 of the CRC.

⁴⁶ See article 2(1) of the UDHR, articles 2(1) and 26 of the ICCPR, article 2(2) of the ICESCR and article 1(1) of the International Convention on the Elimination of all Forms of Racial Discrimination 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969.

⁴⁷ Article 2(1) of the CRC. See also article 3 of the African Children's Charter.

⁴⁸ These proposals were made by Poland and the United States. See UNCHR *Question of a Convention on the Rights of the Child: Report of the Working Group on a Draft Convention on the Rights of the Child* E/CN.4/L.1575 (1981) 7.

⁴⁹ See UNCHR *Question of a Convention on the Rights of the Child: Report of the Working Group on a Draft Convention on the Rights of the Child* E/CN.4/1989/48 (1989) 28-29.

Both the CRC and the African Children's Charter emphasise the fundamental equality of children in the enjoyment of rights protected therein. In terms of the CRC, the inherent equality of the human person should be guaranteed by the state in order to promote every child's right to exercise all rights without discrimination based on stipulated grounds.⁵⁰ In the context of the ICCPR, the Human Rights Committee has noted that it is important for States Parties to recognise that 'the obligation under the Covenant is not confined to the respect of human rights, but also to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific [positive] activities by the States parties to enable individuals to enjoy their rights'.⁵¹ Where the child already adequately exercises the rights in the CRC without obstacles, the duty of the state is to 'respect' or refrain from interfering with the child's exercise of rights. Where the child's enjoyment of his or her rights is sub-optimal, the state's duty is to 'ensure' or take positive steps to promote the adequate enjoyment of these rights on an equal basis.⁵² Both the CRC and the African Children's Charter recognise that the rights of parents, caregivers or family members are inextricably linked and seek to prohibit discrimination (against the child) on the basis of the status of the child's parents, caregivers or family members.⁵³

Children with disabilities,⁵⁴ children born out of wedlock⁵⁵ or incestuous relationships, children living or working in the streets, those living in extreme poverty or heading households, refugee

⁵⁰ Article 2(1) and 2(2) of the CRC.

⁵¹ Human Rights Committee, General Comment 3 'Article 2 Implementation at the national level' (1981) para 3.

⁵² See article 2(2) of the CRC.

⁵³ See articles 2(2) the CRC and 3 of the African Children's Charter.

⁵⁴ Articles 23 of the CRC and 13 of the African Children's Charter give an outline of the positive measures to be taken by States Parties to promote the conditions of living of children with disabilities. For a comprehensive package of the rights of children with disabilities and the measures that must be taken to realise them, see the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006), *entered into force* May 3, 2008 and Committee on the Rights of the Child; CRC General Comment 9 'The rights of children with disabilities' CRC/C/GC/9 (2006) (hereafter CRC General Comment 9); and United Nations, *From exclusion to equality: Realising the rights of persons with disabilities: A handbook for Parliamentarians on the Convention of the Rights of Persons with Disabilities and its Optional Protocol* (2007).

⁵⁵ Many proposals suggested, without success, that the relevant provision should explicitly state that discrimination based on birth out of wedlock is prohibited. See UNCHR *Question of a Convention on the Rights of the Child: Report of the Working Group on the Rights of the Child* E/CN.4/L.1468 (1979) 61; UNCHR *Question of a Convention on the Rights of the Child* E/CN.4/1349 (1980) 3; Defence for Children International (DCI) *The Draft Convention on the Rights of the Child: Informal Consultations Among International Non-Governmental Organisations* (1984) 4; and UNCHR *Question of a Convention on the Rights of the Child: Report of the Working Group on the Rights of the Child* E/CN.4/1986/39 (1986) 4, where the Chinese delegation is reported to have

or asylum seeking children, children in conflict with the law and those who are institutionalised, remain among the most vulnerable in society. Positive measures should be taken to ensure that these categories of children are not isolated and cut off from supportive structures such as the family and society. In cases where children are cut off from families, non-discrimination requires that they be reintegrated into the family and society at large.

Articles 2 of the CRC and 3 of the African Children's Charter call upon States Parties to educate families, schools and communities about the challenges caused by social stereotypes against children living under especially difficult circumstances.⁵⁶ The principle of non-discrimination is promoted by other provisions which require States Parties to take particular measures to reduce patent and latent discrimination in different contexts.⁵⁷ Some of these provisions, particularly article 30 of the CRC, originated from aggressive proposals for the protection of the rights of vulnerable groups, especially children belonging to minority and indigenous groups.⁵⁸ Non-discrimination, in this context, is strongly linked to the child's exercise of the right, in community with other group members, 'to enjoy their own culture, to profess and practice their own religion and to use their own language'.⁵⁹ To avoid intra-group discrimination within minority or indigenous populations, the CRC promotes equality between members of these groups.

proposed that the Convention should require States Parties to 'take all effective measures to ensure that a child born out of wedlock shall enjoy the same legal rights as those enjoyed by a child born in wedlock, in particular the rights enumerated in the present Convention'.

⁵⁶ See generally Committee on the Rights of the Child, 'Initial Reports of States Parties Due in 1992: Sweden' CRC/C//3/Add.1 (1992) 15 and 'Concluding observations of the Committee on the Rights of the Child: Sweden' CRC/C/15/Add.2 (1993) 2-3.

⁵⁷ See article 17(d) of the CRC requiring States Parties to '[e]ncourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous'; article 29(1)(d) providing that education should be directed towards enhancing 'tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin' and article 30 of the CRC, providing that '[i]n those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language'.

⁵⁸ See UNCHR *Question of a Convention on the Rights of the Child: Report of the Working Group on a Draft Convention on the Rights of the Child* E/CN.4/1986/39 (1986) 13; H Tolley Jr *The UN Commission on Human Rights* (1987) 143-44 and World Conference on Human Rights, 'Final Statement of the World Conference on Human Rights, 1993: Vienna Declaration and Programme of Action' (1993) 3.2.

⁵⁹ See generally United Nations Legislative Series (UN LS) 'Multilateral Treaties Deposited with the Secretary General: Status as at December 31, 1992' (1993) 189.

Different forms of discrimination expose certain classes of children to many risks and undermine their access to social services and development.⁶⁰ Gender disparities remain one of the serious challenges to the promotion of children's rights across the world. In this respect, the Committee on the Rights of the Child has observed that even in countries in which laws and policies promise equality between sexes, 'there is in reality still a pattern of disparity between boys and girls, in particular as far as access to education is concerned'.⁶¹ Girls often find themselves not only at the margins of society, but at the margins of the decision-making process in families, schools and society at large. This problem is acute in Africa where systematic gender disparities feed on and are reinforced by patriarchal laws, tradition, culture, religion and gender-based social roles.

Generally, African families and communities create more opportunities for boys than girls, mainly as a result of socio-historical stereotypes which construct females as persons of less worth than males.⁶² Discrimination can also be found in the form of practices which afford children less protection than they deserve. This is evident in practices such as early or forced marriages, human trafficking, child abduction; child labour and other latent forms of exploitation. Again, these social ills predominantly negatively affect girls. Nondiscrimination is important in evaluating the appropriateness of relationships between children's participation rights and parental duties under the CRC and the African Children's Charter. Age should not be

⁶⁰ See generally, Committee on the Rights of the Child, 'Concluding Observations of the Committee on the Rights of the Child: Bolivia' CRC/C/15/Add.1 (1993) para 9, stating that '[v]ulnerable groups of children, including girl children, indigenous children and children living in poverty, are particularly disadvantaged in their access to adequate health and educational facilities and are the primary victims of such abuses as sale, trafficking, child labour and sexual and other forms of exploitation'; 'Concluding Observations of the Committee on the Rights of the Child: Costa Rica' CRC/C/15/Add.11 (1993) paras 9 and 16; 'Concluding Observations of the Committee on the Rights of the Child: Burkina Faso' CRC/C/15/Add.19 (1994) paras 8, 9 and 14; 'Concluding Observations of the Committee on the Rights of the Child: Burundi' CRC/C/15/Add.133 (2000) paras 26-27; and 'Concluding Observations of the Committee on the Rights of the Child: Central African Republic' CRC/C/15/Add.138 (2000) paras 28-29.

⁶¹ Committee on the Rights of the Child, 'Concluding Observations of the Committee on the Rights of the Child: Egypt' CRC/C/15/Add.5 (1993) 2-3.

⁶² For an informative discussion on gender-based discrimination against girls, see *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance A/CONF.189/12* (Durban, South Africa, 21 August – 8 September 2001) para 72; A Lloyd 'A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the child' (2002) 2 *African Human Rights Law Journal* 11; B Thompson 'Africa's Charter on Children's Rights: A normative break with cultural traditionalism' (1992) 41 *International Comparative Law Quarterly* 432; GS Kamchedzera 'The rights of the child in Malawi: An agenda for research on the impact of the United Nations Convention in a poor country' (1991) 5 *International Journal of Law, Policy and the Family* 241, 246; and W Ncube 'The African cultural fingerprint' in W Ncube (ed) *Law, culture, tradition and children's rights in Eastern and Southern Africa* (1998).

an impediment to participation in legislative, administrative and judicial proceedings. To quote the Committee on the Rights of the Child:

The Committee affirms that age should not be a barrier to the child's right to participate fully in the justice process. In cases when States parties have established a minimum age for the right of the child to be heard, measures should be taken to ensure that the views of the child below the minimum age be considered in accordance with the maturity of the child by specially trained social workers or other professionals. The Committee further notes that age should not be an impediment for the child to access complaints mechanisms within the justice system and administrative proceedings.⁶³

In responding to national reports, the Committee on the Rights of the Child has raised concerns about age-based discrimination and recommended that every child be given access to judicial and administrative proceedings in order to exercise their right to be heard.⁶⁴ Once again, discriminatory traditional and cultural practices may impede genuine participation by children, especially girls.⁶⁵ Girls are predominantly negatively affected (than boys) in the context of

⁶³ Committee on the Rights of the Child, 'Day of General Discussion on the right to be heard' (2006) paras 51 and 52.

⁶⁴ Committee on the Rights of the Child, 'Concluding Observations of the Committee on the Rights of the Child: Belgium CRC/C/15/Add.178 (2002) paras 21 and 22, and 'Concluding Observations of the Committee on the Rights of the Child: Chile' CRC/C/15/Add.173 (2002) para 29.

⁶⁵ C Himonga 'The right of the child to participate in decision-making: A perspective from Zambia' in Ncube (note 62 above) 95, 117, arguing that communal decision-making renders the duty to hear the child less imperative; TW Bennett 'The best interests of the child in an African context' (2002) *Obiter* 145, 150, stressing that the aggregation of the interests of the child with those of the community denies the child the space to make rights-based claims against the ethnic group; BA Rwezaura 'Changing community obligations to the elderly in contemporary Africa' 4(1) *Journal of Social Development in Africa* (1989) 5, 12-13; BA Rwezaura 'The duty to hear the child: A view from Tanzania' in Ncube (note 62 above) 57, 78-80; TN Nhlapo 'Culture and women abuse: Some South African starting points' (1992) 13 *Agenda* 5; and A Armstrong, M Chuulu, C Himonga, P Letuka, K Mokobi, W Ncube, T Nhlapo, B Rwezaura and P Vilakazi 'Towards a cultural understanding of the interplay between children's and women's rights: An Eastern and Southern African perspective' (1995) 3 *International Journal of Children's Rights* 333, 337; YC Caraveo, C Perez and J Hernandez 'Youth participation in indigenous traditional communities' in B Percy-Smith and N Thomas (eds) *A handbook of children and young people's participation: Perspectives from theory to practice* (2010) 141; G Lansdown 'The realisation of children's participation rights: Critical reflections' in B Percy-Smith and N Thomas (eds) *A handbook of children and young people's participation: Perspectives from theory to practice* (2010) 11, 14-15, arguing as follows:

In many cultures, children, and, more particularly girls, are expected to be silent in the presence of adults. They are not encouraged to express their views at home, in school or in community gatherings. Asking questions or challenging adult opinions is strongly disapproved of...In these contexts, little will change unless considerable investment is made in working with adults to sensitise them to children's participation rights and the positive impact of their realisation.

participation as many social practices exclude them from decision-making.⁶⁶ The principle of non-discrimination implies that parents should not disregard the child's views based on social stereotypes that overlook the competences of the individual child. To eliminate discrimination of children in the context of participation, States Parties are bound to assure to marginalised children who face exclusion due to customary attitudes, gender stereotypes and patriarchal values, equal rights to fully participate and to have their views given due weight.⁶⁷

To prevent discrimination based on social stereotypes and attitudes, the African Charter calls for the elimination of customs and practices which are 'discriminatory to the child on the grounds of sex or other status'.⁶⁸ These practices and customs would include those that perpetuate the child's 'object' status and limit his or her involvement in decision-making. The Committee on the Rights of the Child has noted that the right to be heard 'applies both to younger and to older children. As holders of rights, even the youngest children are entitled to express their views, which should be 'given due weight in accordance with the age and maturity of the child'.⁶⁹

However, non-discrimination does not mean identical treatment in every instance as children's rights are limited by not only their incapacities, but by the supervisory rights of parents and the freedoms of others.⁷⁰ Equal access to opportunities for the enjoyment of rights requires realising that some children are more marginalised and excluded than others.⁷¹ The concept of equality often requires States Parties to take affirmative action measures, seemingly discriminatory, in order to diminish or eliminate causes of perpetual discrimination in contravention of

⁶⁶ See, for example, T Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (2009) 100, arguing that while girls are expected to submit to patriarchy, 'boys are socialised to make their claims heard, not surreptitiously, but loudly and aggressively in a manner befitting of presidents'.

⁶⁷ Committee on the Rights of the Child, General Comment No. 12 'The right of the child to be heard' CRC/C/GC/12 (2009) (hereafter CRC General Comment 12) paras 75-78. Further, CRC General Comment 12, para 49, stipulates that States Parties should '[c]ombat negative attitudes, which impede the full realisation of the child's right to be heard, through public campaigns, including opinion leaders and the media, to change widespread customary conceptions of the child'.

⁶⁸ See articles 21(1)(b) and 1(3) of the African Children's Charter.

⁶⁹ See CRC General Comment 7, para 14.

⁷⁰ See CRC General Comment 5, para 12 and Human Rights Committee, CCPR General Comment 18 paras 7-8 and 13, stating that '[t]he enjoyment of rights and freedoms on equal footing, however, does not mean identical treatment in every instance....Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.

⁷¹ See, for example, Save the Children *So you want to consult with children? A toolkit for good practice* (2003) 12.

international law.⁷² When discrimination occurs within the family, the state is bound to take steps to remedy this defect. As a general principle, non-discrimination applies to all rights in the CRC, including rights to protection and participation.

4.2 The best interests of the child

Article 3 of the CRC provides that '[i]n *all actions* concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.⁷³ Article 4 of the African Children's Charter provides that '[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration'. Both the CRC and the African Children's Charter, in line with many domestic legal systems, elevate the best interests of the child to the status of a foundational principle of children's rights.⁷⁴ This is demonstrated by the fact that decision-makers are required to promote not the overall, but the 'best' interests of the child. Arguably, the principle is related to the interest theory of rights as it is premised on the notion that children have interests that are so important that it will be wrong for the state to deny children access to goods and services which promote the realisation of these interests.⁷⁵ As shown in Chapter Two, the interest theory defines rights holders as persons whose interests are sufficient grounds for holding others to be under a duty to promote those interests.⁷⁶

The best interests principle applies to a broad range of judicial, administrative, legislative, policy and other measures that have a bearing on children's lives.⁷⁷ It applies to family proceedings

⁷² Human Rights Committee, CCPR General Comment 18, para 10.

⁷³ For an educative exploration of the best interest standard, see G Van Bueren 'A new children's treaty' (1991) 8 *International Children's Rights Monitor* 20, 21.

⁷⁴ D Chirwa 'Children's rights' in D Chirwa *Human rights under the Malawian Constitution* (2011) 193, 201 and B Rwezaura 'The concept of the child's best interests in the changing economic and social context of sub-Saharan Africa' (1994) 8 *International Journal of Law and the Family* 82, 100.

⁷⁵ See N MacCormick 'Children's rights: A test case for theories of right' (1976) 62 *Archiv fur Rechts-und Sozialphilosophie* 305, 311; S Human 'The theory of children's rights' in T Boezaart (ed) *Child law in South Africa* 243, 249 and J Raz 'Legal rights' (1984) 4 *Oxford Journal of Legal Studies* 1, 13-14.

⁷⁶ Sections 2.5.1 and 2.5.2.

⁷⁷ See article 3(1) of the CRC; CRC General Comment 7, para 13 and CRC General Comment 5, paras 12 and 45-47. At para 12 of General Comment 5, the Committee states that the best interests principle 'requires active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions'.

such as divorce, care, and contact; deportation; education; health care; budgeting and many more.⁷⁸ Some leading scholars have suggested that the best interests principle does not apply to family relationships since the family cannot be defined as a ‘private social welfare institution’ or any other structure stated in article 3 of the CRC.⁷⁹ However, the Committee on the Rights of the Child has repeatedly observed that the principle applies to all actions taken in both the public and private spheres of activity.⁸⁰ Further, article 4 of the African Children’s Charter provides that the best interests of the child should be ‘*the* primary consideration’ in all actions taken ‘by any person or authority’; thereby refuting claims that children’s rights do not apply to private relationships between parents and children.

Both the CRC and the African Children’s Charter revolve around the philosophy that the best interests of the child, not those of parents, are the leading factor to be considered when decisions affecting the child are made. According to the Committee on the Rights of the Child, the phrase ‘primary consideration’ implies ‘that the child’s best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness’.⁸¹

⁷⁸ Committee on the Rights of the Child, ‘Concluding Observations of the Committee on the Rights of the Child: United Kingdom CRC/C/15/Add.34 (1995) para 11; ‘Concluding Observations of the Committee on the Rights of the Child: Togo CRC/C/15/Add.83 (1997) paras 34 and 50, emphasising the importance of the best interest standard in the contexts of education, health, social services and budgeting; ‘Concluding Observations of the Committee on the Rights of the Child:Latvia’ CRC/C/15/Add.142 (2001) para 22 and ‘Concluding Observations of the Committee on the Rights of the Child: Canada’ CRC/C/15/Add.215 (2003) para 24.

⁷⁹ M Freeman ‘The best interests of the child’ in A Alen, J Vande Lanotte, E Verhellen, F Ang, E Berghmans, M Verheyde and B Abramson (eds) *Commentary on the United Nations Convention on the Rights of the Child* (2007) 32.

⁸⁰ See Committee on the Rights of the Child, CRC General Comment 7, para 13, noting that all decision making concerning the child – whether taken by parents, professionals and others responsible for the child – must take account of the best interest of the child; CRC General Comment No. 3 ‘HIV/AIDS and the rights of the child’ CRC/GC/2003/3 (2003) (hereafter CRC General Comment 3) para 10; General Comment No. 6 ‘Treatment of unaccompanied and separated children outside their country of origin’ CRC/GC/2005/6 (2005) (hereafter CRC General Comment 6) para 19; CRC General Comment, para 29; General Comment No. 10 ‘Children’s rights in juvenile justice’ CRC/C/GC/10 (2007) (hereafter CRC General Comment 10) para 10; General Comment No. 11 ‘Indigenous children and their rights under the Convention’ CRC/C/GC/11 (2009) (hereafter General Comment 11) para 30; General comment No. 14 ‘The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)’ CRC/C/GC/14 (2013) (hereafter CRC General Comment 14) para 17; and General Comment No. 16 ‘State obligations regarding the impact of the business sector on children’s rights’ CRC/C/GC/16 (2013) (hereafter General Comment 16) para 15-16.

⁸¹ See CRC General Comment 14, para 37.

Evaluating what is ‘best’ for the child is a difficult task and involves the consideration of many competing factors. Some of the relevant factors include the child’s physical, emotional, social and educational needs, age, sex, relationship with parents and caregivers; their family and social background; the child’s identity (sex, sexual orientation, national origin, religion and beliefs, cultural identity and personality);⁸² the importance of stability in the child’s upbringing, the need to preserve the family environment and to maintain family relations; the views and attitude of immediate family members; whether the decision to be made promotes the care, protection and safety of the child; the gravity of the child’s vulnerability; the impact of a particular decision on the life, survival and development of the child; and the child’s views, understanding and sense of direction.⁸³ Further, the interests of other children, parents and the state also play an important role in determining what is in the best interests of a particular child. Which factors are to be considered and the weight to be attached to each of them will depend on the circumstances of each case.⁸⁴

Nonetheless, the fact that the best interests principle is ‘a primary’ consideration does not mean that it surpasses all other interests and factors. The adjective ‘primary’ simply means that when making decisions affecting children, persons and institutions should consider the effect such decisions will have on children. During the drafting of the CRC, it was emphasised that there are situations in which the competing interests of, among other things, ‘justice and society at large, should be of at least equal, if not greater, importance than the interests of the child’.⁸⁵ Against this background, it has been suggested ‘the child’s best interests should be *the* primary consideration in matters directly affecting children and *a* primary consideration in matters in which children are affected only indirectly or in which others are also affected directly’.⁸⁶ This

⁸² See CRC General Comment 6, para 20, stating that ‘[a] determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child’s identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs. Consequently, allowing the child access to the territory is a prerequisite to this initial assessment process. The assessment process should be carried out in a friendly and safe atmosphere by qualified professionals who are trained in age and gender-sensitive interviewing technique’.

⁸³ Committee on the Rights of the Child, General comment No. 15 ‘The right of the child to the enjoyment of the highest attainable standard of health (art. 24)’ (2013) (hereafter General Comment 15) para 12 and CRC General Comment 14, paras 52-79.

⁸⁴ See CRC General Comment 14, para 49.

⁸⁵ See UNCHR ‘Technical Review of the Text of the Draft Convention on the Rights of the Child’ E/CN.4/1989/WG.1/CRP.1, (1989) 14.

⁸⁶ Chirwa (note 74 above) 201.

approach recognises that the best interests principle should not be regarded as an overriding factor in every case as other parties involved may have equal or superior interests in certain contexts. Nonetheless, all actions affecting children should give high priority and greater weight to the best interests of the child.⁸⁷

The best interests principle performs different functions. The first function, discussed by Parker, is that in all matters not regulated by positive rights in the CRC, the best interest standard ‘will be the basis for evaluating the laws and practices of States Parties’.⁸⁸ Second, the principle may be used to justify, support or clarify a certain approach to matters arising under other provisions of the CRC. Thus, the best interests principle is not just one of the factors to be considered when implementing the rights protected in the CRC, but also an aid to meaning construction and interpretation. In this way, article 3 of the CRC can be seen as an attempt to create specific obligations, but instead to prescribe a general principle that should inform decision-making in connection with all actions concerning children. Third, the best interests principle (as a mediatory concept) can ‘assist in resolving conflicts where these arise within the overall framework of the Convention’.⁸⁹ In other words, the best interests principle justifies the (in)correctness of the parent, society or the state in preferring one decision over another.

The last two functions are very important in the context of any attempt to balance the competing rights of parents, mature children and the state. Decision-makers often exploit the mediatory function of the best interests of the child to resolve the constant tension between parental rights, child participation and state intervention. When making decisions concerning the child, the primary or basic concern of parents should be the interests of the child.⁹⁰ The concept of protection intrinsic in the best interests of the child necessitates great levels of parental intrusion into the domain of child autonomy; especially when the child is immature and of tender age.

⁸⁷ See CRC General Comment 14, para 39-40.

⁸⁸ S Parker ‘The best interests of the child – Principles and problems’ (1994) 8 *International Journal of Law and the family* 26, 27.

⁸⁹ P Alston ‘The best interests principle: Towards a reconciliation of culture and human rights’ in P Alston (ed) *The best interests of the child: Reconciling culture and human rights* (1992) 1, 16. See also CRC General Comment 14, para 33, stating that ‘[t]he child’s best interests shall be applied to all matters concerning the child or children, and taken into account to resolve any possible conflicts among the rights enshrined in the Convention or other human rights treaties. Attention must be placed on identifying possible solutions which are in the child’s best interests’.

⁹⁰ See, for example, articles 9 and 18(1) ‘the best interests of the child’.

Thus, the level of decisional autonomy to which a child is entitled or the amount of control which a parent and the state can lawfully exercise depends on which of the two better promotes the best interests of the child. If, by exercising relative autonomy rights, the child would endanger their basic interests in life and survival, such autonomy would not be in the best interests of the child and the state may limit the child's autonomy.⁹¹ Accordingly, the best interests principle serves to ensure that children are not abandoned to their autonomy rights during early childhood as this endangers their basic right to life, survival and development – including the development of the intellectual capacities for rational autonomy.⁹²

More importantly, the principle may also serve to limit parental rights and to bring the state into the family home to defend the child's interests. This is because the state is permitted to intervene if parental care does not match the standards of care prescribed in international law. For instance, articles 9(1) of the CRC and 19(1) of the African Children's Charter do not permit the separation of children from their parents unless 'such separation is necessary for the best interests of the child'. A child who has been separated from one or both parents has the right to maintain regular conduct with such parent(s) if such contact is in the best interest of the child.⁹³ Further, all children who cannot in their best interests be allowed to remain in the family environment are 'entitled to special protection and assistance provided by the State'.⁹⁴ Articles 21 of the CRC and 24 of the African Children's Charter require States Parties to ensure that the best interests of the child are the 'paramount' consideration in all adoption proceedings.

Besides, the CRC and the African Children's Charter confer on every child the right to protection from violence, exploitation, abuse and degradation in multiple contexts. Parents who violate these rights invite the state into the family. In such cases, the state is, in the best interest of the child, allowed to remove children from the care of parents and to place them into alternative or

⁹¹ See ZW Falk 'Rights and autonomy – or the best interest of the child?' in G Douglas and L Sebba (eds) *Children's rights and traditional values* (1998) 111, 113. See also J Raz *The morality of freedom* (1986) 300, where the author argues that where the child wishes to take actions that are detrimental to his/her best interests or to fulfil mistaken desires or goals or to follow a particular life course for mistaken reasons, the child's wishes, desires or goals should be vetoed by the adult vested with the legal authority to guide and direct the child.

⁹² See generally BC Hafen 'Individualism and Autonomy in Family Law: The Waning of Belonging' (1991) *Brigham Young University Law Review* 1.

⁹³ Article 19(3) of the CRC.

⁹⁴ Article 20(1) of the CRC and article 25(2) and (3) of the African Children's Charter.

foster care.⁹⁵ Thus, the best interest principle also allows the state to override parental wishes or the views of the child if they are inconsistent with the best interest of the child.

Finally, it is significant to recognise that children have basic, developmental and autonomy interests. As Eekelaar has pointed out, promoting what is ‘best’ for children entails the protection and promotion of all these interests. Eekelaar places a mature child’s views at the centre of deciding what is in his or her best interests.⁹⁶ Besides, the views of the child are one of the factors to be considered in evaluating what is in the best interest of the child.⁹⁷ Thus, the best interests principle does not just allow parents and the state to make decisions for the child, but also permits for the participation of children in the determination of their own best interests.⁹⁸

4.3 Life, survival and development

Article 6 of the CRC provides that ‘the child has the inherent right to life’ and imposes on States Parties the duty to ‘ensure to the maximum extent possible the survival and development of the

⁹⁵ See CRC General Comment 14, para 34, stating that parents, professionals and the state may abuse the principle of the best interest of the child for their own benefit.

⁹⁶ J Eekelaar ‘Personal rights and human Rights’ in P Lødrup and E Modvar (eds) *Family Life and Human Rights* (2004) 179, 183; J Eekelaar ‘Families and children: From welfarism to rights’ in C McCrudden and G Chambers (eds) *Individual rights and law in Britain* (1994) 301, 301, arguing that ‘[a]lthough it might be held that B has the right that A should promote B’s welfare in accordance with A’s conception of that welfare, such a right is really no right at all. A person who surrenders to another the power to determine where his own welfare lies has in a real sense abdicated his own personal autonomy’; J Eekelaar ‘The best interests of the child and the child’s wishes: The role of dynamic self-determinism’ in P Alston (ed) *The best interests of the child: Reconciling culture and human rights* (1993) 42, 51-52, arguing that ‘[d]ynamic self-determinism extends the range of possible outcomes for children and enhances their capability of choosing between them... A perception which totally identifies children’s well-being with acting in conformity with an existing moral code effectively treats children as objects and is inconsistent with viewing them as rights holders’; J Eekelaar *Regulating divorce* (1991) 103 and J Eekelaar ‘The emergence of children’s rights’ (1986) 6 *Oxford Journal of Legal Studies* 161, 170. For similar views, see also N Thomas and C O’Kane ‘When children’s wishes and feelings clash with their best interests’ (1998) 6 *International Journal of Children’s Rights* 137.

⁹⁷ See Committee on the Rights of the Child, General Comment No. 8 ‘The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)’, CRC/C/GC/8 (2006) para 26, stating that the ‘interpretation of a child’s best interests must be consistent with the whole Convention, including the obligation to protect children from all forms of violence and *the requirement to give due weight to the child’s views*; it cannot be used to justify practices, including corporal punishment and other forms of cruel or degrading punishment, which conflict with the child’s human dignity and right to physical integrity’. See also G van Bueren *International law on the rights of the child* (1995) 47, who argues that the best interest standard does not justify the adoption of a paternalistic, know-all attitude by the decision-maker, but requires a balancing of the values and interests competing for the core of the [child’s] best interests’.

⁹⁸ See for instance CRC General Comment 14, para 53, stating that ‘[a]ny decision that does not take into account the child’s views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child or children to influence the determination of their best interests’.

child’.⁹⁹ The right to life is the most important of all rights as life is a condition for the enjoyment of all human rights. In the words of the Human Rights Committee, the right to life is the ‘supreme right from which no derogation is permitted even in times of emergency’.¹⁰⁰ Article 6 of the CRC underscores the need to avoid the arbitrary termination of children’s lives.¹⁰¹ In terms of international law, the right to life, survival and development embraces negative and positive aspects.¹⁰² The negative aspect of the right to life imposes on States Parties the obligation to refrain from arbitrarily depriving the child of life and survival. This means that States Parties should refrain from imposing forms of punishment – such as the death penalty – which deprive the child of their most basic and important right to life. To underline the importance of the child’s right to life, international human rights instruments, including the ICCPR,¹⁰³ prohibit the imposition of the death penalty on children convicted of criminal offences.¹⁰⁴

The right to life, survival and development also anticipate the abolition of harmful practices such as infanticide; child sacrifice, honour killings, early or forced marriages and female genital mutilation.¹⁰⁵ Female infanticide and selective abortions, based on social stereotypes against the

⁹⁹ Article 5 of the African Children’s Charter also provides for the right to life, survival and development.

¹⁰⁰ Human Rights Committee, General Comment No. 6, HRI/GEN/1/Rev.8 (1982) para 2. See also Human Rights Committee, General Comment No. 14, HRI/GEN/1/Rev.8 (1984) paras 4 to 7, describing the ‘designing, testing, manufacture, possession and deployment of nuclear weapons [as] among the greatest threats to the right to life which confront mankind today’.

¹⁰¹ See CRC General Comment 4, para 24, calling upon all States Parties ‘to take all effective measures to eliminate all acts and activities which threaten the right to life, including honour killings’.

¹⁰² See CRC General Comment 3, para 11; where the Committee on the Rights of the Child stated that ‘[c]hildren have the right not to have their lives arbitrarily taken, as well as to benefit from economic and social policies that will allow them to survive into adulthood and develop in the broadest sense of the word’.

¹⁰³ Article 6(5) of the ICCPR states that the ‘[s]entence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women’.

¹⁰⁴ Article 37 of the CRC and article 5(3) of the African Children’s Charter.

¹⁰⁵ See generally CRC General Comment 9, para 31; General Comment 3, para 11; and CRC General Comment 4, para 24. See also CRC General Comment 3, para 5, where the Committee on the Rights of the Child stated that the right to life-

highlights the need to give careful attention to sexuality as well as to the behaviours and lifestyles of children, even if they do not conform with what society determines to be acceptable under prevailing cultural norms for a particular age group. *In this regard, the female child is often subject to harmful traditional practices, such as early and/or forced marriage, which violate her rights and make her more vulnerable to HIV infection, including because such practices often interrupt access to education and information.* Effective prevention programmes are only those that acknowledge the realities of the lives of adolescents, while addressing sexuality by ensuring equal access to appropriate information, life skills, and to preventive measures (my own emphasis).

girl child, violate the right to life.¹⁰⁶ Early pregnancies have also been reported to cause not only complications during gestation or delivery, but to result in developmental damage to children.¹⁰⁷ Thus, administrative, social and cultural practices which lead to the arbitrary deprivation of life are inconsistent with the CRC.

Further, armed conflicts threaten the life, survival and development of the child.¹⁰⁸ Armed conflicts have emerged as an area of serious concern for the Committee on the Rights of the Child as they lead to the arbitrary deprivation of life through deliberate killings by armed groups and disrupt the delivery to children of social services such as health care, education, housing sanitation, food and clean water.¹⁰⁹ There have been reports, in zones of war or military conflict, of harrowing scenes of ‘extrajudicial killings, disappearances and torture committed by the police and paramilitary groups; the multiple instances of “social cleansing” of street children; and the persistent impunity of the perpetrators of such crimes’.¹¹⁰ These dangers predominantly affect children and explain why UNICEF once lamented that ‘in the wars of the last decade far more children than soldiers have been killed and disabled’.¹¹¹ This further explains why the CRC and the African Children’s Charter prohibit the direct involvement of children (or children below a certain age) in armed conflict.¹¹² It is apparent that the right to life and survival is the basic

¹⁰⁶ Committee on the Rights of the Child ‘Concluding Observations of the Committee on the Rights of the Child: India’ CRC/C/15/Add.115 (2000) para 49 and Committee on the Rights of the Child, ‘Concluding Observations of the Committee on the Rights of the Child: China’ CRC/C/15/Add.56 (1996) paras 15 and 36.

¹⁰⁷ See The Platform for Action of the Fourth World Conference on Women, A/CONF.177/20/Rev.1, held in Beijing, 1995, para 268, where the following observation was made:

More than 15 million girls aged 15 to 19 give birth each year. Motherhood at a very young age entails complications during pregnancy and delivery and a risk of maternal death that is much greater than average. The children of young mothers have higher levels of morbidity and mortality.

¹⁰⁸ Articles 6, 33 and 38 of the CRC read together.

¹⁰⁹ See, for example, Committee on the Rights of the Child, ‘Concluding Observations of the Committee on the Rights of the Child: Burundi’ CRC/C/15/Add.133 (2000) paras 30 and 31.

¹¹⁰ Committee on the Rights of the Child, ‘Concluding Observations of the Committee on the Rights of the Child: Colombia’ CRC/C/15/Add.137 (2000) paras 34 and Committee on the Rights of the Child, ‘Concluding Observations of the Committee on the Rights of the Child: Nigeria’ CRC/C/15/Add.61 (1996) para 24.

¹¹¹ K Castelle, *In the Child's Best Interest*, 3 ed (Philadelphia, Pennsylvania: Defense for Children International, 1990) 12; UN Economic and Social Council, *Official Records*, Summary Record, 61st Meeting, 49th Session, Commission on Human Rights E/CN.4/1993/SR.61, (15 March 1993) 3 and JW Coleman, Jr ‘Poverty: No. 1 Threat to Children’ *Response* (1995) 11.

¹¹² Article 38 is drafted in the following terms:

(2) States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

right from which the protection rights enshrined in children's rights instruments are derived. Thus, the child's right to be protected from all forms of violence, abuse, neglect and exploitation serve to ensure that children enjoy their right to life, survival and development.¹¹³ As noted by the Committee on the Rights of the Child, '[t]he obligation of the State Party under article 6 includes protection from violence and exploitation, to the maximum extent possible, which would jeopardise a child's right to life, survival and development'.¹¹⁴

The negative dimension of the right to life plays an important role in balancing the competing interests of children, parents and the state. States Parties, parents and children must exercise their rights in ways that do not endanger the child's basic right to life, survival and development. Parents have no room, under article 6 of the CRC, for asserting parental autonomy from state interference in matters that endanger the child's life the same way States Parties cannot exploit national sovereignty to justify practices that lead to the arbitrary killing of children. In much the same way, international human rights law completely removes decision-making powers from children in matters which directly undermine the child's right to life and requires States Parties to adopt certain measures to protect children from harm and enhance their 'maximum survival and development'. Under this approach, any decision which leads to the arbitrary deprivation of life should be vetoed, by the courts for instance, on the basis that it is not in the best interests of the child. This remains so regardless of whether the decision in question has been made by parents, children or the state.

(3) States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

See also Committee on the Rights of the Child 'Concluding Observations of the Committee on the Rights of the Child: Iraq' CRC/C/15/Add.94 (1998) para 15, where the Committee on the Rights of the Child observed that it was 'deeply concerned at the early legal minimum age of voluntary enlistment into the armed forces. It recommends that States Parties should raise the legal minimum age of voluntary enlistment into the armed forces in the light of international human rights and humanitarian law'. See also Committee on the Rights of the Child 'Concluding Observations of the Committee on the Rights of the Child: Mozambique' CRC/C/15/Add.172, paras 30 and 31, where it was observed that Mozambique should 'continue efforts to clear landmines and ensure the provision of physical rehabilitation and other relevant support to victims'.

¹¹³ See articles 19, 32-36 and 38 of the CRC.

¹¹⁴ See Committee on the Rights of the Child, General Comment 6, para 23.

In the CRC, the right to life is also a positive right in the sense that it imposes on States Parties and parents the positive duty to protect life. This means that both the state and parents have the duty to prevent actions, by third parties such as doctors, which may lead to the arbitrary deprivation of the child's life. This positive dimension also links the right to life to the child's socio-economic conditions through the concepts of survival and development.¹¹⁵ States Parties are bound 'to ensure to the maximum extent possible the survival and development of the child'.¹¹⁶ This is a significant improvement on the provisions of earlier international instruments which portrayed life as a negative right not linked to socio-economic aspects of human life. During negotiations leading to the adoption of the CRC, it was underlined that 'life and survival were complementary and were not mutually exclusive, and that survival could even mean the diminution of infant mortality'.¹¹⁷ The rights to life, survival and development imposes on the state the duty to 'reduce infant mortality, increase life expectancy [and] adopt measures to eliminate malnutrition and epidemics'¹¹⁸ and to provide goods and services 'that are most basic to the child's existence'.¹¹⁹ States Parties are bound to take positive measures to curb malnutrition, poverty, and preventable diseases, and to enhance children's access to health care services and quality education.¹²⁰ Read together, the notions of life, survival and development provide the basis for the protection of social and economic rights.¹²¹ At the heart of this holistic

¹¹⁵ UNCHR *Legislative History of the Convention on the Rights of the Child* Volume 1 (2007) 365-66, para 21.

¹¹⁶ Article 6(2) of the CRC.

¹¹⁷ UNCHR (note 115 above) 365, para 18. See also UNCHR *Question of a Convention on the Rights of the Child: Report of the Working Group to the Commission on Human Rights* E/CN.4/1988/28 (1988) (hereafter Report of the Working Group (1988)) paras 14 to 26.

¹¹⁸ R Hodgkin and P Newell *Implementation handbook for the Convention on the Rights of the Child* 3 ed (2007) 84. See also CRC General Comment 7, para 10, where the Committee on the Rights of the Child interpreted article 6 of the CRC as follows:

States Parties are urged to take all possible measures to improve perinatal care for mothers and babies, reduce infant and child mortality, and create conditions that promote the well-being of all young children during this critical phase of their lives. Malnutrition and preventable diseases continue to be major obstacles to realizing rights in early childhood. Ensuring survival and physical health are priorities, but article 6 encompasses all aspects of development, and that a young child's health and psychosocial well-being are in many respects interdependent. Both may be put at risk by adverse living conditions, neglect, insensitive or abusive treatment and restricted opportunities for realising human potential.

¹¹⁹ D Chirwa and T Kaime 'Where are the missing pieces? Constructing a mosaic of the CRC and the African Children's Charter in Malawi's law and policy' 2008 *Malawi Law Journal* 85, 94.

¹²⁰ See article 24(3) requiring States Parties to 'take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children'; CCPR General Comment 17, para 3 and article 28 of the CRC requiring States Parties to take positive steps to promote the child's right to education;

¹²¹ See, for example, General Comment 7, para 10, stating that life, survival and development are promoted by the realisation of the 'rights to health, adequate nutrition, social security, an adequate standard of living, a healthy and

approach to the right to life is the realisation that ‘[a]ny significant harm to the child’s physical and mental development sustained in childhood might doom the child’s chances of an independent and worthy adult life for good, that is if the child is lucky enough to make it to adulthood’.¹²²

Development is a multifaceted concept. It embraces physical, spiritual, moral, social, emotional, political and intellectual aspects of human life.¹²³ The physical, intellectual and social aspects of development have implications for the enjoyment of participation rights.¹²⁴ Physical development signifies the growth of motor skills as evidenced by the child’s ability to control his or her own body and involves coordination between the brain and body muscles. Social development is the process through which the child acquires skills on how to interact with other people around him or her, including the capacities to solve problems and handle conflicts. It concerns the growth of the child’s ability to function optimally in society and to understand that other people have perspectives of their own.¹²⁵ Intellectual development refers to the growth of the child’s mental or cognitive abilities so that the brain gradually becomes more and more capable of understanding and assessing various concepts in a more rational way.

All dimensions of the right to development require parents and the state to view the child’s right to life holistically and to foster the attainment by the child of all competences required for effective participation in decision-making. More importantly, the right to development embraces the need to develop the child’s intellect and capacities for rational autonomy in the long run. This fosters meaningful participation and binds parents and the state to consider the child’s

safe environment, education and play (articles 24, 27, 28, 29 and 31), as well as through respect for the responsibilities of parents and the provision of assistance and quality services’ (articles 5 and 18 of the CRC).

¹²² Chirwa (note 74 above) 193, 203.

¹²³ See article 27 of the CRC, referring to the child’s right to ‘physical, mental, spiritual, moral and social development’ and CRC General Comment 5, para 12, stating that States Parties are expected ‘to interpret “development” in its broadest sense as a holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological and social development’.

¹²⁴ For an informative discussion on different forms of development, see ES Scott, D Reppucci, JL Woolard ‘Evaluating adolescent decision-making in legal contexts’ (1995) 19 *Law and human behaviour* 221.

¹²⁵ For discussions on emotional development, see ES Scott and T Grisso ‘Developmental incompetence, due process and juvenile justice policy’ (2004-2005) 83 *North Carolina Law Review* 793, 814; NG Guerra, L Nucci and RL Huesmann ‘Moral cognition and childhood aggression’ in RL Huesmann (ed) *Aggressive behaviour: Current perspectives* (1994) 13, 23.

perspective when making decisions which affect the child.¹²⁶ According to the Committee on the Rights of the Child, ‘child participation is a tool to stimulate the full development of the personality and the evolving capacities of the child consistent with article 6 and with the aims of education embodied in article 29’.¹²⁷ Thus, while intellectual development directly promotes effective participation, participation also enhances the evolution of the child’s capacities for rational autonomy. On the whole, the right to life grounds child participation, parental responsibility and state intervention if any of these promotes the child’s life, survival and development.

4.4 Child participation as a general principle

Child participation is a general principle under the CRC. Article 12(1) of the CRC extends to every ‘child who is capable of forming...own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child’. For purposes of exercising this right, every child is entitled to the right to be heard in all proceedings affecting them.¹²⁸ The child’s right to be heard is also protected in the African Children’s Charter.¹²⁹ Article 12 of the CRC differentiates between the right to speak (to express an opinion) and the right to be heard (to have an opinion taken into account), the first having no value if the second is not taken seriously.¹³⁰ The CRC portrays children not as passive objects of parental love and charitable care, but as social actors and citizens with an active role in the family and social life.¹³¹ It embodies a departure from the

¹²⁶ See generally article 3 of the Declaration on the Right to Development A/RES/41/128 (1986).

¹²⁷ See CRC General Comment 12, para 79. See also CRC General Comment 7, para 10, where the Committee on the Rights of the Child stated that ensuring child survival and development implies that ‘[f]rom an early age, children should themselves be included in activities promoting good nutrition and a healthy or disease-preventing lifestyle’.

¹²⁸ Article 12(1) and (2) of the CRC.

¹²⁹ Article 4(2) of the African Children’s Charter.

¹³⁰ A Anderson and A Spijker ‘Considering the view of the child when determining her best interest’ (2002) *Obiter* 365, 369.

¹³¹ See sections 6.1-6.3 of Chapter Two. For scholarly discussions on the social agency of children, see M Wartofsky ‘The child’s construction of the world and the world’s construction of the child: From historical epistemology to historical psychology’ in FS Kessel and AW Siegel (eds) *The child and other cultural inventions* (1981) 188, 199; A James and A Prout (eds) *Constructing and reconstructing childhood* (1990) 4; M Freeman ‘Introduction: Children as persons’ in M Freeman (ed) *Children’s rights: A comparative perspective* (1995) 1, 3, arguing that the CRC ‘recognises the child as a full human being, with integrity and personality and with the ability to participate fully in society’; M Freeman ‘The sociology of childhood’ (1998) 6 *International Journal of Children’s Rights* 433, 438; N Taylor, P Tapp and M Henaghan ‘Respecting children’s participation in family law proceeding’ (2007) *International*

property theory of rights, confirms the separate personhood of the child and disaggregates the views of the child from those of their parents.¹³²

As an empowerment right, article 12 highlights the transformative potential of the CRC as a whole, particularly as it relates to the parent-child relationship. In line with sociological theory, discussed in Chapter Two of this study, it underlines that children should no longer be viewed merely as ‘objects’ of protection, but as legal subjects with rights and civil liberties.¹³³ More importantly, it recognises that children’s vulnerability and need for protection partly originates from their lack power. As Van Bueren puts it, article 12 recognises that children’s right to be protected is not only achieved by ‘giving...adults greater powers of intervention, but also by giving children the power to consent to and challenge decisions which affect their lives’.¹³⁴ In a way that resonates with sociological theory, Article 12 of the CRC challenges images of children as mere dependents and places the child – as a complete human being and bearer of rights – at the centre of the international human rights debate.¹³⁵ It directly challenges traditional notions of

Journal of Children’s Rights 61, 67; and J Sloth-Nielsen and BD Mezmur ‘Surveying the research landscape to promote children’s rights in an African context’ (2007) 7(2) *African Human Rights Law Journal* 330, 345, observing that ‘[b]oth CRC and the African Children’s Charter recognise that rights talk is of particular value for children, providing them with a status and a stake in the debates about issues which affect them. It is no longer feasible to ignore children’s voices and child-centred perspectives that recognise children as individual persons’.

¹³² See sections 6.1-6.3 of Chapter Two.

¹³³ See sections 6.1-6.3 of Chapter Two. See also Committee on the Rights of the Child, General Comment 7, para 5, stating that ‘[t]he Convention requires that children, including the very youngest children, be respected as persons in their own right. Young children should be recognized as active members of families, communities and societies, with their own concerns, interests and points of view. For the exercise of their rights, young children have particular requirements for physical nurturance, emotional care and sensitive guidance, as well as for time and space for social play, exploration and learning’ and General Comment 3, para 12, stating that ‘[i]nterventions have been found to benefit children most when they are actively involved in assessing needs, devising solutions, shaping strategies and carrying them out rather than being seen as objects for whom decisions are made’.

¹³⁴ G Van Bueren ‘Children’s Rights: Balancing traditional values and cultural plurality’ in Douglas and Sebba (note 91 above) 15, 21. See also G Lansdown and R Karkara ‘Children’s right to express views and have them taken seriously’ (2006) 367 *Essay Focus* 690, 690, arguing as follows:

Historically, children’s perspectives and experiences have been disregarded in favour of those of adults; young people considered to lack the expertise and competence to inform adult decision-making, irrespective of whether the decisions directly affect them. Now, governments, policymakers, professionals, and *parents* are required to take greater note of the concerns of those younger than age 18 years, giving due weight to the views expressed in accordance with the age and maturity of the child.

¹³⁵ See sections 6.1-6.3 of Chapter Two. See also CRC General Comment 7, para 5; E Brems ‘Children’s rights and universality’ in JCM Willems (ed) *Developmental and autonomy rights of children*, 2 revised ed (2007) 11, 19-22; S Mushcroft *Children’s rights: Reality or rhetoric? The UN Convention on the Rights of the Child: The first ten years* (International Save the Children Alliance; 1999) 16; AB Smith ‘Rethinking childhood: The inclusion of children’s voice’ in Y Ronen and CW Greenbaum (eds) *The case for the child: Towards a new agenda* (2009) 15; and AB

children as property or citizens in-the-making and prescribes that children be entitled to influence decision-making in all matters affecting them.¹³⁶ These remarks have implications for the exercise of parental responsibility and state intervention. The right to be heard enables competent children to challenge adult authority in a way stipulated by sociological theory and imposes on parents and the state the duty to cede control of the decision-making process to children when this is justified by the child's age and maturity. Therefore, article 12 recognises children as social actors with the ability to participate in matters which have a bearing on their lives.¹³⁷ This is an important development given the traditional depiction of children as less rational than adults and the enduring emphasis on child protection rights.¹³⁸ Although it is not clear whether the drafters of the CRC were influenced by sociological theory, it is patent that the provisions relating to participation resonate with the central tenets of this theory.

There have been concerns that the idea of participation affords children autonomy and de-emphasises the role of parents and the state in ensuring that children exercise rights

Smith and H Bjerke 'Children's citizenship' in NJ Taylor and AB Smith (eds) *Children as citizens? International voices* 15, 17-18.

¹³⁶ For a detailed discussion of children as social actors, see sections 6.1-6.3 of Chapter Two. See CRC General Comment 7, para 14.

¹³⁷ See sections 6.1-6.3 of Chapter Two. On why children should be viewed as active social actors, see P Alderson 'The rights of children and young people' in A Coote (ed) *The welfare of citizens developing new social rights* (1992) 175; D Leonard 'Persons in their own right': Children and sociology in the UK' in L Chisholm, P Buchner, HH Kruger and P Brown (eds) *Childhood, youth and social change: A comparative perspective* (1990) 58-70; I Frones, AM Jensen and A Solberg *Childhood as a social phenomenon* (National Report, Norway; 1990) 41; J Kovarik 'The space and time of children at the interface of psychology and sociology' in J Qvortrup, M Bardy, G Sgritta and H Wintersberger (eds) *Childhood matters: Social theory, practice and politics* Vol 14 (1994) 101, 109-10; D Archard *Children: Rights and childhood*, second edition (2004) 77; A James, C Jenks and A Prout, *Theorising childhood* (1998) 69; I Frones 'Dimensions of childhood' J Qvortrup, M Bardy, G Sgritta and H Wintersberger (eds) *Childhood matters: Social theory, practice and politics* Vol 14 (1994) 145, 157; HLA Hart 'Are there any natural rights?' in AI Melden (ed) *Human rights* (1970) 61, 61-62.

¹³⁸ See D Dickenson and D Jones 'True wishes: The philosophy and developmental psychology of children's informed consent' (1995) 2 *Philosophy, Psychiatry and Psychology* 287; and G Van Bueren 'The United Nations Convention on the Rights of the Child: An evolutionary revolution' in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) 202, 206 and 207, arguing as follows:

Decision-making in accordance with the Convention on the Rights of the Child ought to be influenced by the child's wishes. It is, however, traditional to a number of cultures that children are perceived as being less rational, less secure and less autonomous than adults....*A false priority exists in many states where it is argued that a higher value ought to be placed on child protection rights, at the expense of developing a cultural awareness of child participation. However, it is not a question of 'either or'. Implicit in the Convention is that the quality of child protection is improved in communities which listen to children.*

responsibly.¹³⁹ It is often claimed that by recognising children's developing autonomy, the CRC encourages children to become challengers of their parents and families.¹⁴⁰ At the forefront of the United States' reasons for non-ratification is the claim that 'the Convention intrudes into family life and interferes with the parent-child relationship'.¹⁴¹ These concerns arise from an unholistic reading of the CRC as all the rights of the child should be seen through the lens of the parental right to guide and direct the child.¹⁴² Read as a whole, the CRC reveals neither that children have absolute autonomy nor that the CRC's primary aim is to disregard parental responsibility. As has been noted, parents and families are referred to in 'nineteen of the Convention's forty substantive articles'.¹⁴³

As demonstrated below, the proper view seems to be that the international system of children's rights has not yet embraced the notion that children are fully autonomous citizens capable of making major decisions without parental guidance. Instead, what has emerged is an acknowledgement that children have the ability to form and express meaningful views at earlier ages than was previously thought and that these views should be given due weight in the decision-making process. It is beyond doubt that article 12 of the CRC seeks to challenge and eradicate exclusionary child-rearing practices and to promote the genuine inclusion of children in

¹³⁹ On broader arguments against child autonomy, see also BC Hafen 'Children's liberation and the new egalitarianism: Some reservations about abandoning youth to their rights' (1976) *Brigham Young University Law Review* 605, 644-51; BC Hafen, 'Exploring test cases in child advocacy' (1986) 100 *Harvard Law Review* 435, 446; arguing that reducing the discretion of parents and other authority figures potentially creates 'a vacuum that deprives children of an affirmative source of support and guidance' and BB Woodhouse 'From property to personhood: A child-centred perspective on parents' rights' (1997-1998) *Georgetown Journal on Fighting Poverty* 313, 313.

¹⁴⁰ PF Fagan *How the UN Conventions on women's and children's rights undermine family, religion and sovereignty* (Heritage Foundation, 2001) and JP Doek 'What does the Children's Convention require?' (2006) 20 *Emory International Law Review* 199, 202, stating that '[i]t has been suggested that the child is left to his or autonomy. Further, critics assert that the rights of parents are or will be undermined, and the emphasis on the child as an individual ignores the importance of the family'.

¹⁴¹ See P Mahery 'The United Nations Convention on the Rights of the Child: Maintaining its value in international and South African child law' in T Boezaart (ed) *Child law in South African law* (2009) 309, 312.

¹⁴² See, for example, article 5 of the CRC and MS Pais 'The Convention on the Rights of the Child' in *Manual of human rights reporting under six major international human rights treaties* (Geneva, Switzerland: United Nations Office of the High Commissioner for Human Rights, 1997) 393-505, arguing, correctly in my view, that-

parents are particularly well-placed to build the capacity of children to intervene in a growing manner in the different stages of decision, to prepare them for responsible life in a free society informing them, giving them the necessary guidance and direction while assuring children the right to express views freely and give those views due weight. Children's opinions will thus be taken into account, although not necessarily endorsed, and children will be given the possibility of understanding the reasons for a different decision being taken.

¹⁴³ See C Cohen 'The role of the United States in the drafting of the Convention on the Rights of the Child' (2006) 20(1) *Emory International Law Review* 185, 195-96.

the making of all decisions affecting them. In this respect, it is important for the state, parents and families to promote democratic parenting and to encourage children to be included in resolving conflicts within the family.¹⁴⁴ However, the obligation to listen to children who are capable of freely expressing own views does not necessarily charge adults or courts with an obligation to blindly give decisive weight to children's views as such views do not always coincide with the child's best interests.¹⁴⁵

4.5 Interim conclusion

Just like other children's rights, the general principles discussed above are interrelated, interdependent and indivisible. To enable children to enjoy all the rights in the CRC more fully, parents and the state should respect and promote all the general principles when making decisions affecting children. This means that the principles of non-discrimination, the best interest of the child; child participation and life, survival and development should be promoted holistically in order to enable the child to exercise all rights. As discussed above, the principle of non-discrimination seeks to promote equality and end age-, gender- and culture-based discrimination in the decision-making process.

The best interests of the child largely seeks to give parents and the state the practical ground for interfering with the child's exercise of autonomy rights. Further, the negative dimension of the right to life plays an important role in balancing the competing interests of children, parents and the state. Thus, States Parties, parents and children must exercise their rights in ways that do not endanger the child's basic right to life, survival and development. Participation stipulates that the child be given an opportunity to express views and be heard in all matters concerning them. In the context of reconciling child participation, parental rights and state intervention, it is important to note that the primary consideration is the best interests of the child, particularly the child's basic interest in life, survival and development. This means that child, parent and state should promote the preservation of life and the development of the child's capacities for a

¹⁴⁴ See CRC General Comment 12, para 92, stating that 'States parties should encourage, through legislation and policy, parents, guardians and child-minders to listen to children and give due weight to their views in matters that concern them. Parents should also be advised to support children in realising the right to express their views freely and to have children's views duly taken into account at all levels of society'.

¹⁴⁵ This position is discussed in detail at section 5.3.1 below.

responsible and autonomous adulthood. In the next section, this study considers the classification of children's rights in international law and examines the relationships that exist between the rights of children, parents and the state.

5 THE CATEGORISATION OF CHILDREN'S RIGHTS IN INTERNATIONAL LAW

This section discusses the different categories of rights and investigates how each category deals with the relationship between the child, the parent and the state. The general principles discussed above are amplified by different sets of rights enshrined in the CRC and the African Children's Charter. These rights include provision rights, protection rights and participation rights. These categories of rights should be read holistically as they are indivisible, interrelated and mutually reinforcing. Each set of rights largely represents specific interests of children; with provision rights broadening the child's interest in developing optimally; participation rights promoting the child's interest in making decisions once competent to do so; and protection rights emphasising the child's interest in being protected from harm, neglect, violence, degradation and all forms of exploitation. Protection in the decision-making context largely comes in the form of parental duties and the responsibility of the state in ensuring that parental duties are exercised in the best interest of the child.

5.1 Provision rights

These are rights to the provision of goods and services. The CRC recognises the indivisibility of children's rights¹⁴⁶ and acknowledges that rights are more than injunctions against the state.¹⁴⁷ Provision or socio-economic rights are largely derived from and broaden the scope of the right to life, survival and development.¹⁴⁸ They include the rights to the highest attainable standard of

¹⁴⁶ On the indivisibility of human rights, see CRC General Comment 5, paras 6 and 25.

¹⁴⁷ RL Barsh 'The Convention on the Rights of the Child: A re-assessment of the final text' (1989-1990) 7 *New York Law School Journal of Human Rights* 142, 143, observing that the 'most obvious aim of a Convention on children would be to give children a *priority* in the adoption of State measures, and allocation of State resources, especially for the realization of human rights in the field of economic and social rights'.

¹⁴⁸ See LJ LeBlanc *The Convention of the Rights of the Child* (1995) 65.

health care,¹⁴⁹ social security,¹⁵⁰ an adequate standard of living,¹⁵¹ and education.¹⁵² Rights to provision are important in fostering the child's physical and intellectual development. Their importance must be seen against the indivisibility of human rights, introduced in article 6(2) of the CRC, and the need to adopt a holistic approach to children's rights.¹⁵³ Thus, the inclusion of socio-economic rights in the overall design of the CRC emphasises the link between the provision of certain goods, balanced growth and full citizenship.

Socio-economic rights underline the significance of the positive or material dimension of children's rights. The main reason behind their inclusion is the child's right to development in all its forms. For instance, article 27(1) of the CRC requires States Parties to 'recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development'. The primary bearers of the positive duty to provide the required goods and services are parents,¹⁵⁴ but states have an equally pressing duty if parents are incapable of providing for the needs of their children.¹⁵⁵ Articles 18, 24, 26, 28 and 29 of the CRC impose various obligations on parents and the state to provide particular services to ensure that the child's right to development is not undermined, but promoted. More importantly, it is vital to recognise that the right to education is central to the development of the cognitive capabilities needed to take part in democratic decision-making.¹⁵⁶ The developmental function which education performs explains why States Parties are under a duty to protect children from work that is, among others, likely to interfere with the child's education.¹⁵⁷ It is the very reason why

¹⁴⁹ Article 24 of the CRC.

¹⁵⁰ Article 26 of the CRC.

¹⁵¹ Article 27 of the CRC.

¹⁵² Articles 28 and 29 of the CRC.

¹⁵³ On indivisibility and universality, see generally A Sajo (ed) *Human rights with modesty: The problem of universalism* (2004) Chs 1-3; 5-6 and 8-10; JW Nickel 'Rethinking indivisibility: Towards a theory of supporting relations between human rights' (2008) 30 *Human Rights Quarterly* 948-1011; DJ Whelan *Interdependent human rights: A history* (2010) and J Donnelly *Universal human rights in theory and practice* 3 ed (2013) 31 and 40;

¹⁵⁴ See articles 27(2) of the CRC and 18(1) of the CRC.

¹⁵⁵ See articles 27(3) and 18(2) of the CRC.

¹⁵⁶ For a comprehensive defence of compulsory education, see G Haydon 'The right to education and compulsory schooling' (1977) 9(1) *Educational Philosophy and Theory* 1, 1-14.

¹⁵⁷ See article 32 of the CRC. See also A Gutman 'Children, paternalism, and education: A liberal argument' (1980) 9(4) *Philosophy and Public Affairs* 338, 349-50, arguing that-

a child's right to compulsory education is a precondition to becoming a rational human being and a full citizen of a liberal democratic society. Without any formal schooling, children will be incapable of intelligently exercising their civil or political rights within our society...We rank children's rights to education above their rights to religious freedom since we believe that this restriction of their present

parents and the state, for instance, have the right to veto a young child's decision to refuse to attend school for whatever reasons.¹⁵⁸ As the Committee on the Rights of the Child once noted:

The overall objective of education is to maximise the child's ability and opportunity to participate fully and responsibly in a free society...A child's capacity to participate fully and responsibly in a free society can be impaired or undermined not only by outright denial of access to education but also by a failure to promote an understanding of the values recognised in article [29 of the CRC].¹⁵⁹

Apart from their role in enhancing the child's physical and intellectual development, provision rights have a limited contribution to other aspects of this study. As an area in which parents and the state work together to promote the child's right to life, survival and development, there is limited or no room for conflicts between parents, children and the state. Against this background, it is clear that a detailed discussion of the implications of these rights for the clash between children's rights, parental responsibility and state intervention, is not necessary.

5.2 Protection rights

As briefly noted above,¹⁶⁰ protection rights are intended to promote the child's basic right to life, survival and development. International law confers on the state the power to adopt measures designed to prevent the deaths of children and to promote their 'maximum survival and development'. For instance, States Parties are bound to 'take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or

liberty is necessary to create the conditions for future enjoyment of religious and other freedoms. Without education, liberal freedoms lose a great deal, even if not all, of their value... A child's right to education is a necessary precondition for the development of capacities to choose a conception of the good life and to employ the political freedoms of democratic citizenship... The value of a liberal democracy to its citizens is in large part contingent upon the ability of its citizens to exercise their political rights intelligently as well as to choose among alternative conceptions of the good life. Allowing parents to deprive their children of the right to education blocks realisation of these basic future freedoms of personal and political choice.

¹⁵⁸ Article 28(1)(a) of the CRC imposes on States Parties the duty to '[m]ake primary education compulsory and available free to all'.

¹⁵⁹ See Committee on the Rights of the Child, General Comment No. 1 'Article 29(1): The Aims of Education' CRC/GC/2001/1 (2001) paras 12 and 14. See also D Hodgson 'The international human right to education and education concerning human rights' (1996) 4 *International Journal of Children's Rights* 237, 241, arguing that the word 'compulsory', in section 28 of the CRC, 'is intended to imply that no person or body can prevent children from receiving a basic education...This imposes an obligation on the State to ensure that children receive at least an elementary education in circumstances of parental neglect or ignorance, for example'.

¹⁶⁰ Section 4.2 above.

mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child'.¹⁶¹ In addition, States Parties bear the obligation to protect children, through legislative and other measures, from the illicit use or trafficking of narcotic drugs and psychotropic substances and to prevent children from being involved in the production or trafficking of these substances.¹⁶² Further, children are also protected from all forms of torture or degrading treatment and from the death penalty or life imprisonment without parole when convicted of criminal offences.¹⁶³ Children are also protected against the harmful effects of armed conflict and States Parties are bound to ensure that those below the age of 15 years do not directly participate in hostilities.¹⁶⁴ States also bear the obligation to 'prevent the abduction of, the sale of or traffic in children for any purpose or in any form'.¹⁶⁵ Article 36 of the CRC stands as a sweeping provision designed to protect every child from *any* form of exploitation harmful to the child's welfare.

The rights referred to above, and many other protection rights, seek to prohibit practices that endanger the child's right to life, survival, and development. For example, extreme violence, abuse, neglect, exploitation and involvement in criminal activities often result in developmental damage and, in some cases, death. Neglectful and abusive parents have the potential to harm children emotionally and physically, and the state may intervene by moving children into alternative care to remedy the problem.¹⁶⁶ Further, these practices negatively affect the child's readiness for and performance in school; thereby undermining the child's right to intellectual development and justifying corrective state monitoring of parental responsibility.¹⁶⁷

¹⁶¹ Article 19(1) of the CRC. See also article 16(1) of the African Children's Charter.

¹⁶² Article 33 of the CRC and 28 of the African Children's Charter.

¹⁶³ For detailed provisions intended to protect children from the harmful effects of the criminal justice system, see articles 37 and 40 of the CRC and article 17 of the African Children's Charter.

¹⁶⁴ Article 38(1)-(4) of the CRC and article 22(1)-(3) of the African Children's Charter.

¹⁶⁵ Article 35 of the CRC and 29 of the African Children's Charter.

¹⁶⁶ For empirical evidence supporting this view, see M Barry 'Minor rights and major wrings: The views of young people in care' in B Franklin (ed) *The New Handbook of Children's Rights* (2001) 239-54.

¹⁶⁷ See articles 32(1) of the CRC and 15(1) of the African Children's Charter. These provisions recognise the importance of education for the child's intellectual development as they seek to protect children from performing work that is likely 'to interfere with [the child's] education or to be harmful to the child's health or physical, mental, spiritual, moral or social development'

Abused children moved into alternative care are entitled ‘to special protection and assistance provided by the State’.¹⁶⁸ As noted by Wald, protection rights ‘encompass claims that the state should more actively protect children from harm [caused] by adults, especially their parents’.¹⁶⁹ That children need to be protected from serious psychological and physical harm is also evident from States Parties’ duty to ‘take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children’.¹⁷⁰ Article 21 of the African Children’s Charter shows more bite and determination where issues of life and death are concerned. Article 21(1) requires States Parties ‘to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child’. In particular, States Parties are required to eliminate ‘customs and practices prejudicial to the health or life of the child; and customs and practices discriminatory to the child on the grounds of sex or other status’.¹⁷¹

Unlike the CRC, the African Children’s Charter directly prohibits the betrothal of children and early marriages, and requires States Parties to set ‘the minimum age of marriage’ at 18 years.¹⁷² As has been confirmed by the Committee on the Rights of the Child,¹⁷³ traditional practices harmful to child health include, among others, female circumcision; forced or early marriages; marriages between close relatives; multiple taboos which prevent women from controlling their own fertility; traditional birth practices; ritual or honour killings; the caste system; disputes regarding dowry; virginity testing; forced feeding traditional medicine; infanticide and selective

¹⁶⁸ See articles 20(1)-(3) of the CRC, and 23(3) and 25(1)-(3) of the African Children’s Charter for provisions regulating the placement of children into alternative care.

¹⁶⁹ M Wald ‘Children’s right: A framework for analysis’ (1979) 12 *University of California, Davies Law Review* 255, 261-62. However, as Van Bueren argues, the greatest challenge arises from the need to find ways of protecting children from intra-familial wrongs ‘without intruding upon family privacy and overregulating’ private relationships. See Van Bueren (note 97 above) 87.

¹⁷⁰ Article 24(3) of the CRC. See also article 21 of the African Children’s Charter.

¹⁷¹ Article 21(1)(a) and (b) of the African Children’s Charter.

¹⁷² Article 21(2) of the African Children’s Charter.

¹⁷³ For a comprehensive of Concluding Observations in which the Committee referred to specific traditional practices harmful to the child’s health, see J Tobin ‘The international obligation to abolish traditional practices harmful to children’s health: What does it mean and require of States?’ (2009) 9(3) *Human Rights Law Review* 373, 380-81.

abortions.¹⁷⁴ Most of these practices threaten the life, survival, development, health and education of children.

International law recognises that parents may be responsible for acts of abuse, neglect, exploitation and violence. While many children grow up in family environments that function relatively well, ‘for some the family does not constitute a safe and supportive’ social institution.¹⁷⁵ This is why, for instance, article 19(1) of the CRC seeks to protect the child from all forms of abuse or exploitation ‘while in the care of parent(s), legal guardian(s) or any other person who has the care of the child’. Apart from registering a significant departure from the historical aggregation of children’s rights and parental rights, the child’s right to protection ‘while in the care of parents’ signifies that parents do not always act in the best interests of the child and may be perpetrators of gross abuse and exploitation of children. Parents no doubt bear the responsibility for the upbringing of children, but the state bears the primary responsibility to intervene to promote the child’s rights if parents are breaching any of the protection rights stated above.

Protection rights perform an important function in balancing different competing interests and signify the approach to be taken in interpreting other provisions of the CRC and the African Children’s Charter. First, they define and limit the province of parental autonomy by stating, as a matter of law, what parents may not do when exercising parental responsibilities and rights. Under the CRC and the African Children’s Charter, the provisions entrenching children’s protection rights largely outline the areas in which parents do not enjoy autonomy from state control and suggest how parents should exercise their powers in those areas in which they do have autonomy rights. The scope of parental autonomy in the latter areas – particularly rights relating to family life, privacy and religion – should not undermine the protection to which the child is entitled as this jeopardises the child’s basic right to life, survival and development. Thus, protection rights serve to emphasise that where there is a real threat to the child’s life, and

¹⁷⁴ See generally *Question of a Convention on the Rights of the Child: Report of the Working Group on a Draft Convention on the Rights of the Child* E/CN.4/1987/25 (1987) and *Report of the Working Group on Traditional Practices Affecting the Health of Women and Children* E/CN.4/1986/42 (1986) para 18.

¹⁷⁵ See CRC General Comment No. 4 ‘Adolescent health and development in the context of the Convention on the Rights of the Child’ CRC/GC/2003/4 (2003) (hereafter CRC General Comment 4) para 15 and CRC General Comment 9, para 42.

physical and intellectual development, parents have no autonomy from state control. There is a great deal of standard-setting and state intervention in this field of children's rights. Accordingly, protection rights constitute the minimum standards which parents may not derogate from when exercising responsibility in respect of children.

As for children, it should be noted that the main reason for entrusting their care into the hands of others, is that they lack the intellectual and material capacity to care for themselves. This point was discussed in great detail in Chapter Two.¹⁷⁶ Claims for more protective measures call for the substitution of one adult's decision for that of another. They, too, limit the child's individual autonomy rights. While children should no doubt be given an opportunity to air their views on how best they can be protected from abuse, violence, exploitation and other harmful practices,¹⁷⁷ States Parties have the duty to determine whether these views enhance or undermine children's right to protection. The Committee on the Rights of the Child has observed that in developing measures to protect children, States Parties should take 'into account the evolving capacities of adolescents and involve them in an appropriate manner'.¹⁷⁸ However, the child's views are a marginal consideration as protection rights define and limit the province of child autonomy.

Where the child makes autonomy-based claims of rights which endanger the very child's protection rights, parents and the state are entitled to disregard the child's views; particularly in areas where parental control or state intervention are necessary to protect the child's basic right to life, survival and development. States are entitled to respond in particular ways to limit or eliminate the exposure of children to harmful practices and it matters not that the child has 'consented' to participating in such practices. In fact, the child lacks the legal capacity to consent to harmful practices. For instance, the state would not ask physically or sexually abused children whether they wished to remain in the care of abusive parents as international law presumes such children to be incapable of protecting their long term interests and allows the state to place them

¹⁷⁶ See sections 3, 4 and 5 of Chapter Two.

¹⁷⁷ See generally C Feinstein and C O'Kane 'Children's and adolescent's participation and protection from sexual abuse and exploitation' *Innocenti Working Paper* 2009-09 (Florence, Italy: UNICEF Innocenti Research Centre 2008); ECPAT International 'Ensuring Meaningful Child and Youth Participation in the Fight against Commercial Sexual Exploitation of Children: The ECPAT experience' (Bangkok, 2007) and C Feinstein, S Laws and R Karkara *An introductory workshop report on child participation in the UN study on violence against children* (Sweden: Save the Children, 2004).

¹⁷⁸ See CRC General Comment 4, para 12. See also para 19 of the same General Comment.

in alternative care. Similarly, provisions prohibiting the recruitment of child soldiers are not about asking whether or not children want to participate in armed conflict. Instead, they limit rather than broaden the province of the child's autonomy and require states to take measures to protect the child's right to life, survival and development.

5.3 Participation- and autonomy-related rights

Participation- and autonomy-related rights relate to every citizen's rights to express their views freely and to influence decision-making in all matters that concern them. They constitute, to borrow Donnelly and Howard's definition, an acknowledgment that people (including children) are 'active, creative beings in charge of, or at least struggling to shape their lives. People must not simply be protected against attacks by the state or other citizens, they must be empowered to act and to lead autonomous lives'.¹⁷⁹ In the category of participation rights falls the right to be heard; freedom of expression; access to information; freedom of thought, conscience and religion; and freedom of association and assembly. One may add, also, the rights to privacy and education. Below is a discussion of the child's rights to be heard, freedom of expression, access to information, and the right to privacy. These rights have direct implications for the triangular relationship between the child, the parent and the state, particularly in the context of health care decision-making.

5.3.1 The right to be heard

Article 12(1) and (2) of the CRC protects the child's right to express his or her views freely in all matters affecting the child and to be heard in judicial and administrative proceedings, either directly or through an appropriate body. Generally, article 12 of the CRC signifies that States Parties have the obligation to provide the child with an opportunity to participate in administrative and judicial proceedings affecting him or her.¹⁸⁰ Article 12 is the focal point of child participation rights, with other provisions reinforcing the child's right to take part in the

¹⁷⁹ J Donnelly and R Howard 'Assessing national human rights performance: A theoretical framework' (1988) 10 *Human Rights Quarterly* 214, 234-35.

¹⁸⁰ S Detrick *A commentary on the United Nations Convention on the Rights of the Child* (1999) 219-20.

decision-making process. This section explores the content of article 12 and explains in some detail the scope the child's right to be heard in all matters affecting them. However, particular focus is given to the key aspects of the child's right to be heard.

5.3.1.1 The duty to ensure that the child expresses views freely

Under the CRC, States Parties have an obligation to involve children willing to participate in matters affecting them.¹⁸¹ Article 12 does not seek to force States Parties to pressure children to express their views. Instead, it obliges signatories to ensure that children who wish to participate, have a right to convey their views without any form of coercion.¹⁸² Article 12 recognises that children have perspectives of their own, that they are at liberty to elect not to express the views they form and that their unique vulnerability to adult or peer pressure may unduly influence their decision-making.¹⁸³ The CRC seeks to ensure that children do not become mouthpieces for parroting the views of other people. The more grave the problem, the greater the freedom (to choose whether to be involved) to be granted to the child. When the child participates through an intermediary, the intermediary must ensure that the child expresses her own opinion freely, has not been subjected to external pressure and receives all, not partial or condensed, information to enable her to make an informed choice.¹⁸⁴

The absence of freedom of expression interferes with the subject's capacity to form personal views or exercise free will and implicates the implementation of article 12. The right to express not the other person's, but one's own views ties well with the child's freedom of expression enshrined in article 13 of the CRC. Freedom of expression imposes a duty on the authorities to provide and develop the conditions for the free exercise of this right, whether in terms of

¹⁸¹ See, for example, CRC General Comment 7, para 14, observing that '[t]o achieve the right of participation requires adults to adopt a child-centred attitude, listening to young children and respecting...their individual points of view'.

¹⁸² R Bessner *The voice of the child in divorce, custody and access proceedings*, Report commissioned by the Department of Justice Canada (2002) 7 and KJ Partsch 'Freedom of conscience and expression, and political freedoms' in L Henkin (ed) *The international Bill of Rights: The Covenant on Civil and Political Rights* (1981) 209-45.

¹⁸³ See L Steinberg and E Cauffman 'Maturity of judgment in adolescence: Psychological factors in adolescent decision-making' 20(3) *Law and Human Behaviour* (1996) 249.

¹⁸⁴ RA Washak 'Payoffs and pitfalls of listening to children' (2003) 52(4) *Family relations* 373, 375.

competence, professional ethics and appropriate places for the child to be heard.¹⁸⁵ This part of article 12(1) requires the decision-maker to inform the child of all available alternatives, the likely decisions to be made, the possible consequences of each decision and the conditions under which the child will express their own views.¹⁸⁶

‘In all matters affecting the child’ is admittedly an open-ended phrase and should be given the broadest possible interpretation. In terms of the African Children’s Charter, children’s right to express their opinions is not restricted to matters that directly affect them as all children are entitled to express their views freely ‘in all matters’.¹⁸⁷ If this provision is interpreted literally, it will cover almost every aspect of life as children are affected by almost everything that happens in the world. Under the CRC, the duty to elicit children’s views is qualified by the phrase ‘matters affecting the child’¹⁸⁸ and it is arguable that where the matter does not *directly* affect children, there is no duty to elicit their views.¹⁸⁹

Nonetheless, it should be recalled that Polish and American attempts, during the drafting process, to specify the kinds of issues on which children should be heard were rejected and it was finally agreed that article 12 should not be ‘subject to the limits of a list’, but should apply to a broad range of matters.¹⁹⁰ This was because the extent to which children could exercise freedom of expression and the right to be heard turned on the age and maturity of the child as well as appropriate levels of parental control.¹⁹¹ The Committee on the Rights of the Child has observed that the command that children be listened to applies to family, legislative and policy decision-making as well as to administrative, judicial and other measures that have a bearing on the child’s life.¹⁹² This implies the need to listen to children and give due weight to their views in all

¹⁸⁵ Marie-Francoise Lucker-Babel ‘The right of the child to express views and to be heard: An attempt to interpret Article 12 of the UN Convention of the Rights of the Child’ (1995) 3 *International Journal of Children’s Rights* 391, 398.

¹⁸⁶ See CRC General Comment 12, para 25.

¹⁸⁷ Article 7 of the African Children’s Charter.

¹⁸⁸ See CRC General Comment 12, paras 26 and 27.

¹⁸⁹ See generally M Freeman ‘Article 3: The best interests of the child’ in A Alen, J Vande Lanotte, E Verhellen, F Ang, E Berghmans and M Verheyde (eds) *A commentary on the United Nations Convention of the Rights of the Child* 1, 46.

¹⁹⁰ UNCHR *Question of a Convention on the Rights of the Child: Report of the Working Group on Draft Convention on the Rights of the Child* E/CN.4/L.1575 (1981) 13.

¹⁹¹ Ibid, 14.

¹⁹² See generally CRC General Comment 12, para 12.

decisions concerning them. Since it should not be subject to ‘the limits of a list’, the proceedings to which article 12 of the CRC applies are broader than these areas.

5.3.1.2 *The duty to give due weight to the views of the child*

Listening to children speak is one thing, taking what they say seriously is another. According ‘due weight’ to children’s views requires going beyond tokenistic ventures towards achieving full participation.¹⁹³ According ‘due weight’ means analysing the child’s views, giving the participants feedback on how their views have been interpreted; informing them the extent to which their views have influenced the final outcome; and providing them with the opportunity to challenge the analysis of the findings and to participate in follow-up processes, if any.¹⁹⁴ Giving ‘due weight’ requires ‘real change’,¹⁹⁵ not only to the way we envision children’s views but to the weight we accord those views. However, it does not mean that the child’s preference should be given systematic pre-eminence, but that their view will be considered in light of the nature of the problem and the degree to which it represents the child’s interests and the interests of others – parents and other members of the family for instance. When the decision to be taken, for example inter-country adoption, has imminent and heavy consequences on the child, the child’s views deserve considerable attention.

Article 12 does not state the age at which children are legally presumed to acquire the competence to participate in different contexts. The absence of a competence-predicting age is an acknowledgement that children form views at very early stages in the life course.¹⁹⁶ The stipulation of a specific age at which children are presumed competent to express views freely would have excluded all children below the stipulated age from influencing decisions. Age-based competence predictions impede meaningful participation by children below that age as they create a presumption of incompetence for children below such an age.

¹⁹³ R Hart *Children’s participation: From tokenism to citizenship* Innocenti Essays No. 4 (UNICEF International Child Development Centre, Florence, Italy: 1992) 9-10.

¹⁹⁴ See CRC General Comment 12, para 134.

¹⁹⁵ See CRC General Comment 5, para 12.

¹⁹⁶ E Ochaita and MA Espinosa ‘Children’s participation in family and school life: A psychological and developmental approach’ (1997) 5(3) *International Journal of Children’s rights* 279, 284-88 and F Ang, E Berghmans, L Cattrisse, I Delens-Ravier, M Delplace, V Staelens, T Vandewiele, C Vandresse and M Verheyde *Participation rights of children* (2006) 12-14.

More importantly, children's capacities are not homogenously linked to their biological age. Although age is a usual predictor of competence, children's capacities develop at different speeds, not least as a result of environmental, nutritional and other factors.¹⁹⁷ Access to information, experience, the environment, cultural expectations, developmental goals and different levels of support all contribute to the development of a child's capacities to form a view. In assessing psychological competence, age is the default starting point, but alone, it does not reveal how much weight has to be accorded to the child's views. Article 12 does not require the child to reach full mental development in order to participate. The child should have an overall idea of the issue in question.

Children's capacities develop at different rates and it is inappropriate to portray 'development' as a fixed trajectory toward maturity, culminating in the acquisition of adult competences when the child reaches the age of majority.¹⁹⁸ While the characteristics that distinguish adolescents from adults do not disappear when an individual attains majority status, some adolescents reach levels of maturity some adults will never attain. Children may mature beyond their chronological ages and appropriate weight should be accorded to the views of every child who reflects sufficient maturity.¹⁹⁹ Today, adolescents are better educated, better informed and healthier than ever before.²⁰⁰ In high resource contexts, the internet, education, travel and high standards of living have broadened horizons for early maturation than in the past.²⁰¹ Conversely, poverty often leads to stunted physical and intellectual development.²⁰²

¹⁹⁷ BM Lester and TB Brazelton 'Cross-cultural of neonatal behaviour' in DA Wagner and HW Stevenson (eds) *Cross-cultural perspectives on child development* (1982) 20-53; D Frank and S Zeisel 'Failure to thrive' (1988) 6 *Paediatric Clinics of North America* 1187-1206; and C Landers *Early child development summary report*, (UNICEF, 1989) 6.

¹⁹⁸ See E Buss 'Rethinking the connection between developmental science and juvenile justice' 2009 76(1) *University of Chicago Law review* 493, 508.

¹⁹⁹ Van Bueren (note 97 above) 136.

²⁰⁰ United Nations, *World youth report: The global situation of youth*, UN Youth Unit (2004).

²⁰¹ See M Freeman *The rights and wrongs of children* (1983) 46.

²⁰² See generally D Frank and S Zeisel 'Failure to thrive' (1988) 6 *Paediatric Clinics of North America* 1187-1206; B Lozoff, GM Brittenham, AW Wolf, DK McClish, PM Kuhnert, E Jimenez, R Jimenez, LA Mora, I Gomez and D Krauskoph 'Iron deficiency anemia and iron therapy effects on infant developmental test performance' (1987) 79 *Pediatrics* 981-995 and GH Beaton 'Energy in human nutrition: Perspectives and freedoms' (1982) 41 *Nutrition Review* 325-40.

In the face of such infinite variations, stating the age at which every child generally acquires capacities to make independent decisions may exclude some children who have the psychological competence to do so simply because they have not reached that age. It could also entitle children who have impaired reasoning capacities to make independent and damaging decisions just because they have attained that age. This explains why the CRC does not state the age at which every child is legally presumed to acquire particular competences, but instead refers to ‘maturity’ or evolving capacities of the child. It is in this context that article 12 requires the law and the state machinery to adopt an individualised approach to determining children’s capacities and the weight to be accorded to children’s views. Article 12 acknowledges that childhood is a period during which the child matures incrementally, moving gradually through varying degrees of autonomy prior to reaching the statutory age of majority.

As children grow in age, intelligence and experience, they should be given more opportunities to make decisions and to experience the consequences thereof, for it is through practice that new competences are acquired.²⁰³ However, the duty to listen to the child and to give due weight to the views of the child does not compel decision-makers to give determinative weight to the child’s views.²⁰⁴ This is because the child’s views do not always coincide with their best interests and developmental rights. Factors such as the age of the child, the content of the child’s view, the reasons given for holding that view, whether the child understands the consequences of implementing their views and the complexity of the decision, generally determine the weight to be accorded to the child’s view.

Nonetheless, the child does not have a legal duty to persuade adults of her maturity for adults to give due weight to her views.²⁰⁵ ‘Due weight’ should be given to the views of the child who is able to form and freely express such views. The right in article 12 of the CRC is one that every child has because she has a view, it is not a right to be heard only where the child’s views will definitely guide adults in determining what is best for her, ‘nor is it a right to show adults that

²⁰³ See G Lansdown ‘Promoting children’s participation in democratic decision-making’ (Florence: UNICEF Innocenti Research Centre, 2001) 6.

²⁰⁴ See H Brighthouse ‘How should children be heard’ (2003) 45(3) *Arizona Law Review* 691, 703.

²⁰⁵ See GB Melton ‘Parents and children: Legal reform to facilitate children’s participation’ (1999) 54 *American Psychologist* 935, 939, stating that for the child to be able to participate, ‘[a]ll that is required is the ability express a preference’.

[the child] is mature enough to be self-determining'; it is a basic right each child has to be involved in a process by which her destiny is determined even though her opinion of that destiny has no authoritative value on the ultimate determination of the matters and even though she cannot possibly convince the decision-maker of her ability to make own decisions.²⁰⁶ Yet, when a decision is taken against the child's strongly-held views, this fact alone does not mean that the decision-maker has not accorded due weight to the child's views.

Lastly, whether a child is competent enough to have their views given determinative weight depends on the seriousness of the decision to be made and the risks associated with it. As demonstrated above, respecting children's evolving capacities is not synonymous with extending absolute autonomy to children. Competence is not an all or nothing concept in terms of which the subject either lacks it or possesses it. It is task-specific and there is no concrete stage at which the child can be regarded as categorically capable of making all decisions and therefore free from parental control. The capacities of the child and the nature of the decision to be made, influence the degree of autonomy to be given to the child in exercising his or her rights.²⁰⁷ Where the potential harm attached to the decision is relatively low, children may be permitted to take full responsibility without having to demonstrate high levels of maturity. Where the child lacks the competence to understand the consequences of a particular decision and such decision endangers the best interests of the child, it is imperative for parents to override the views of the child. However, it must be recalled that while the CRC and the African Children's Charter require decision-makers to give due weight to the freely expressed views of a child, the international system of children's rights has not yet embraced the notion that children are autonomous citizens capable of making major decisions without parental direction.²⁰⁸ The primary duty of parents and

²⁰⁶ D Archard and M Skivenes 'Balancing a child's best interests and a child's views' (2009) 17 *International Journal of Children's Rights* 1, 19-20.

²⁰⁷ As Kleinig once wrote, 'a child is likely to be able to decide with the requisite rationality whether and what games it will play, before it is able to decide whether and who to marry'. See J Kleinig 'Mill, children and rights' (1976) 8(1) *Educational Philosophy and Theory* (1976) 1, 7.

²⁰⁸ See G Van Bueren 'The international protection of family members' rights as the 21st Century approaches' (1995) 17(4) *Human Rights Quarterly* 732, 741, 743 and 744, arguing in the following terms:

Allowing children to participate in decision-making within the family implies a loss of adult power and the right to freedom of expression is not traditionally a right associated with children within or outside of the family unit... By incorporating a reference to 'all matters affecting the child', there is no longer a traditional area of exclusive parental or family decision-making. Similarly, by referring to two criteria of equal value, the age and maturity of the child, states parties do not have an unfettered discretion as to when

the state is to evaluate whether the child's views are in keeping with their best interests, particularly the child's interests in life, survival and development.

5.3.2 The right to privacy

Privacy is another participation-related right under the CRC. Article 16 of the CRC provides as follows:

- (1) No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
- (2) The child has the right to the protection of the law against such interference or attacks.²⁰⁹

Like many other provisions entrenching civil and political rights, the right to privacy originated from a draft made by the United States. Generally, the right to privacy is intended to protect every individual from 'arbitrary' interference by public functionaries and private persons.²¹⁰ The child's privacy rights challenge family privacy and limit the scope of parental control of the child on intimate matters of life.²¹¹ From its wording, it is evident that privacy is the right 'to be let alone' to make important decisions on private matters of life. Privacy becomes more pertinent the closer society and the state move to the individual's space, person and home. It is commonly accepted that the child can make privacy claims against parents.²¹²

to consider and when to ignore the views of children who disagree with the traditional family decision-makers. Hence, the participation rights of children – which are essential to child empowerment – are consistent with the ideological basis of the Children's Convention, which is based upon the principle that children have rights that "transcend those of the family of which they are a part"...*The participatory rights of the child within family life amount to supported and active participation, but this ought not to be confused with "self-determination", a term that implies not only the right to participate in decision-making, but the right to have decisions followed. This is clearly not the case, as Article 5 of the Children's Convention demonstrates.*

²⁰⁹ See also article 10 of the African Children's Charter.

²¹⁰ See M Bossuyt *Guide to the 'travaux Préparatoires' of the International Covenant on Civil and Political Rights* (1987) 339-40 and HRC CCPR General Comment 16, para 1.

²¹¹ See *Report of the Working Group* (1988) para 56 and S Detrick (ed) *The United Nations Convention on the Rights of the Child: A guide to the travaux préparatoires* (1992) 260, who indicates that it was noted during discussions leading to the adoption of the CRC that 'the right to privacy might, to some extent, impair the relationship between the parents and the child'.

²¹² B Shmueli and A Blecher-Prigat 'Privacy for children' (2011) 42(3) *Columbia Human Rights Law Review* 759, 763, stating that 'children should have an individual right for privacy against their parents, while recognising that this right should be qualified according to the child's age and evolving capacities'.

Some scholars have insisted that the right to privacy provides limited room ‘either for children’s minority status or for the role of adults who are unavoidably involved in a child’s private world’.²¹³ Privacy rights essentially protect the child against ‘arbitrary’ and ‘unlawful’ interference (by parents and the state) with the child’s privacy interests.²¹⁴ The fact that the child is entitled to individual privacy²¹⁵ implies that the family, particularly parents, and the state can hardly justify violations of a *mature* child’s personal rights within the family home. The phrase ‘arbitrary interference’ is intended to limit interferences to those that are reasonable in the circumstances of each case.²¹⁶ Parental or state intervention is arbitrary if it is ‘without justification in valid motives and contrary to established legal principles’.²¹⁷ To be lawful, interference must be done in terms of positive law and within the limits established by such law.²¹⁸ Legislation authorising violations of the right to privacy should specify the circumstances in which such violations are permitted.²¹⁹ A decision to rely on the legislation permitting violations of privacy should be made by authorities empowered to do so.²²⁰ Thus, the child’s right to privacy constitutes a subset of the family’s privacy claims and entitles children to make privacy claims against other members of the family. How much privacy is given to the child depends on the age and maturity of such child.²²¹

Generally, it is thought that the right to privacy is the basis for mature minors’ claims to take control of the decision-making process in such private matters as reproductive health.²²²

²¹³ BC Hafen and JO Hafen ‘Abandoning children to their autonomy: The United Nations Convention on the Rights of the Child’ (1996) 37(2) *Harvard International Law Journal* 449, 472.

²¹⁴ Detrick (note 180 above) 277 and *Memorandum of the Dutch Law of the Realm concerning the Ratification of the Convention on the Rights of the Child* (1992-1993) 16.

²¹⁵ Article 15 of the CRC and 10 of the African Children’s Charter.

²¹⁶ Detrick (note 180 above) 31 and 272 and CCPR General Comment 16, para 4.

²¹⁷ LA Rehof ‘Article 12’ in A Eide, G Alfredsson, G Melander, LA Rehof and A Rosas (eds) *The Universal Declaration of Human Rights: A commentary* (1992) 187.

²¹⁸ See Rules 9 and 32 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, General Assembly Resolution 45/113 (1990); ICCPR General Comment 16, para 3 and F Volio ‘Legal personality, privacy and the family’ in L Henkin (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 185, 195.

²¹⁹ Detrick (note 180 above) 272.

²²⁰ See CCPR General Comment 16, para 8.

²²¹ See Detrick (note 180 above) 277.

²²² See Committee on the Rights of the Child, CRC General Comment 4, para 40, stating that highest attainable standard of health grounds the child’s confidentiality, privacy, participation in reproductive decisions, access to information and counselling to enable mature minors to negotiate the health-behaviour choices they make; ‘Concluding Observations of the Committee on the Rights of the Child: Bangladesh’ CRC/C/15/Add.221 (2003) para 60 ‘develop youth sensitive and confidential counselling, care and rehabilitation facilities that are accessible

Adolescents deemed mature enough to make independent decisions are entitled to privacy and confidentiality in the context of counselling and access to sensitive health care services such as abortion and contraception.²²³ In the case of *Llantoy Huaman v Peru*,²²⁴ the Human Rights Committee (HRC) considered the effect of restrictive abortion laws on the health of pregnant women and girls. This case involved a 17-year old girl pregnant with an anencephalic foetus. Born without much of their brains, anencephalic babies die soon after birth. Thus, the complainant sought an abortion which the director of the relevant hospital refused based on Peru's restrictive laws on abortion.²²⁵ Despite several medical reports confirming the fatal condition of the babe, the potential danger to the mother's health and the psychological damage that could result from carrying an anencephalic babe to term, the director of the hospital denied the complainant's request for an abortion.

In January 2002, the complainant gave birth to an anencephalic baby girl and fed her for four days of life before her impending death. Apart from finding that the denial of an abortion violated the complainant's right, under Article 7 of the ICCPR, to be free from cruel and inhuman treatment, the HRC held that the Peruvian government's actions arbitrarily interfered with the complainant's right to privacy in violation of article 17 of the ICCPR.²²⁶ In this respect, the HRC seemed to concur with the complainant's argument that Article 17 includes a 'right to make independent decisions about [one's] reproductive [life]'.²²⁷ These observations imply that the right to privacy is central to the exercise by the child of reproductive rights. This is consistent with the approach taken by the Committee on the Rights of the Child as the later has recognised adolescents' relative autonomy in reproductive decision-making. In the words of the Committee:

without parental consent when this is in the best interest of the child'; and RE Shepherd 'Civil rights of the child' in CP Cohen and HA Davidson (eds) *Children's rights in America: UN Convention on the Rights of the Child compared with United States law* (1990) 135, 143, observing that article 16 of the CRC grants children the exact 'right to privacy' from which 'the constitutional protections for procreation and abortion decision-making has come'.

²²³ See, for instance, General Comment 4, para 11, stating that '[a]dolescents deemed mature enough to receive counselling without the presence of a parent or other person are entitled to privacy and may request confidential services, including treatment'

²²⁴ (1153/2003), CCPR/C/85/D/1153/2003 (2005); 13 IHRR 355 (2006). For a detailed discussion of this case, see S Joseph 'United Nations Human Rights Committee: Recent cases' (2006) 6(2) *Human Rights Law Review* 361, 361-64 and C Zampas and JM Gher 'Abortion as a human right: International and regional standards' (2008) 8(2) *Human Rights Law Review* 249, 269-71.

²²⁵ Under Peruvian law, abortion is allowed only if it is necessary to save the life of a pregnant woman or to avoid severe permanent damage to her health.

²²⁶ Ibid, para 6.4.

²²⁷ Ibid, para 3.6.

With regard to privacy and confidentiality, and the related issue of informed consent to treatment, States parties should (a) enact laws or regulations to ensure that confidential advice concerning treatment is provided to adolescents so that they can give their informed consent. Such laws or regulations should stipulate an age for this process, or refer to the evolving capacity of the child; and (b) provide training for health personnel on the *rights of adolescents to privacy and confidentiality*, to be informed about planned treatment and to give their informed consent to treatment.²²⁸

The privacy and freedom given to mature minors in the context of reproductive health rights appears to spring from the imperative to advance the child's life, survival and development. In some of its concluding observations and general comments, the Committee on the Rights of the Child has emphasised that teenage pregnancy and early marriages pose a serious challenge to the child's sexual and reproductive health.²²⁹ To protect children from unplanned pregnancies, unsafe backstreet abortion and dropping from school, the international community has interpreted the right to privacy to include medical and reproductive autonomy for mature minors.²³⁰ Much of the debate in this area is influenced by the need to reduce both the large number of teenage and unwanted pregnancies and the spread of the HIV/AIDS pandemic and other sexually transmitted diseases (STDs).²³¹ These factors affect, negatively, children's right to life, survival and development.²³² In this respect, there is an important link between the child's rights to privacy, access to information, health care, life, survival and development.

²²⁸ See CRC General Comment 4, para 31.

²²⁹ See Committee on the Rights of the Child, 'Concluding Observations of the Committee on the Rights of the Child: Andorra' CRC/C/15/Add.176 (2002) para 42; 'Concluding Observations of the Committee on the Rights of the Child: Belize' CRC/C/15/Add.99 (1999) para 225; and 'Concluding Observations of the Committee on the Rights of the Child: Benin' CRC/C/15/Add.106 (1999) para 25.

²³⁰ On why abortion and reproduction are major public health concerns, see generally Report of the International Conference on Population and Development, Cairo, 5-13 September 1994, A/CONF.171/13/Rev.1, Chapter VIII C. Women's Health and Safe Motherhood (1995) para 8.25; World Health Organization (WHO), *Unsafe abortion: global and regional estimates of incidence of and mortality due to unsafe abortion with a listing of available country data* 3 ed (Geneva: WHO, 1997) 3-14; G Vukovich *Key actions for the further implementation of the programme of action of the international conference on population and development* report of the Ad Hoc Committee of the Whole of the Twenty-First Special Session of the General Assembly, A/S-21/5/Add.1 (1999) at para 63(iii), available at: www.un.org/popin/unpopcom/32ndsess/gass/215a1e.pdf, accessed 21 September 2007 and RJ Cook, BM Dickens and MF Fathalla *Reproductive Health and Human Rights: Integrating Medicine, Ethics and Law* (2003) 26.

²³¹ See Committee on the Rights of the Child, 'Concluding Observations of the Committee on the Rights of the Child: Cape Verde' CRC/C/15/Add.168 (2001) paras 51 and 52; and 'Concluding Observations of the Committee on the Rights of the Child: Spain' CRC/C/15/Add.185 (2002) para 39.

²³² Committee on the Rights of the Child, 'Concluding Observations of the Committee on the Rights of the Child: Brunei Darussalam' CRC/C/15/Add.219 (2003) para 46; 'Concluding Observations of the Committee on the Rights of the Child: Argentina' CRC/C/15/Add.187 (2002) para 51; 'Concluding Observations of the Committee on the

To be fair, the CRC does not impose any direct limitation on the child's right to privacy and provides instead that 'the child has a right to the protection of the law against...interferences or attacks on [their] honour and reputation'.²³³ Nevertheless, the relevant provisions of the CRC and the African Children's Charter do not support the view that privacy rights naturally require the absolute termination of parental control over the child's private activities.²³⁴ Since children live in communities populated by others, privacy is a relative right and authorities may require the child's private information if it is in the best interests of the child or the interests of society.²³⁵

Article 16(1) indirectly limits the right to privacy by protecting the child only from 'arbitrary or unlawful interference with his or her privacy'. Parental interferences that are well-founded, lawful and justifiable are therefore permitted under the CRC. The *travaux préparatoires* of the CRC demonstrate that article 5 of the CRC was intended to ensure that the child's enjoyment of such freedom rights as privacy does not impair the relationship between the child and his or her parents.²³⁶ To this end, article 10 of the African Children's Charter explicitly provides, as part of its scheme for the protection of the child's privacy, that 'parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children'. What amounts to 'reasonable supervision' depends on the maturity of the child, the potential risks of restricting parental guidance in a particular area, the public interest sought to be protected by the infringement of privacy, the best interests of the child and the circumstances of each case.

5.3.3 The rights to freedom of expression and access to information

Freedom of expression is closely related to and promotes participation in democratic decision-making. The right to freedom of expression enables 'the child to develop its mind and itself in

Rights of the Child: Bhutan' CRC/C/15/Add.157 (2001) para 45; 'Concluding Observations of the Committee on the Rights of the Child: Cambodia' CRC/C/15/Add.128 (28 June 2000) para 53; and 'Concluding Observations of the Committee on the Rights of the Child: Libyan Arab Jamahiriya' CRC/C/15/Add.15 (2003) para 38, stressing the need for States Parties to 'ensure that adolescents have access to, and are provided with, education on reproductive health' and to strengthen efforts in the area of adolescent health education within the education system'

²³³ Article 16(2) of the CRC.

²³⁴ Detrick (note 180 above) 270 and 275.

²³⁵ Detrick (note 180 above) 275 and ICCPR General Comment 16, para 10.

²³⁶ Detrick (note 180 above) 276.

society with others and grow into a citizen participating in public life as such and not merely as a mindless consumer'.²³⁷ It fosters the child's self-development and nourishes 'the development of more reflective and mature individuals and [thus] benefit[s] society as a whole'.²³⁸ Article 13(1) of the CRC provides that '[t]he child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice'. Unlike under the right to be heard, freedom of expression under article 13 is not only exercised when children become capable of forming coherent views. The very young can express themselves through symbolic ways such as art, mood and actions.²³⁹ The scope of article 13 is very broad as the relevant provisions apply to relations within the family and society at large.²⁴⁰

Freedom of expression is mainly a 'negative' right in that it requires mainly the state to refrain from interfering with the child's exercise of the right. This is also evident from the idea that the choice on whether the child expresses him or herself 'orally, in writing or in print...or through any other media' belongs to the child.²⁴¹ Parents and the state may not restrict the ways in which children express themselves without violating the 'freedom' aspect of the right. Nonetheless, the content of freedom rights is not the same for children and adults as the degree to which a child is entitled to individual liberty turns on their age and maturity, and is limited by parental responsibility and state intervention.²⁴² Under article 13(1) of the CRC, the content and scope of

²³⁷ H Thorgeirsdottir 'Article 13: Freedom of Expression' in A Alen, J Vande Lanotte, E Verhellen, F Ang, E Berghmans and M Verheyde (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (2006) 1, 19. See E Barendt *Freedom of Speech*, 2ed (2005) 6-23, demonstrating that the rationale of freedom of expression involves the importance of discovering the truth, its place as an aspect of self fulfilment, citizen participation in democratic decision-making and lack of trust concerning the functioning of governments.

²³⁸ TD Campbell 'Rationales for Freedom of Communication' in TD Campbell and W Sadurski (eds) *Freedom of Communication* (1994) 17, 33-34.

²³⁹ For a fuller discussion on this point, see A Holzscheiter *Children's rights in international politics: The transformative power of transnational discourse* (2010) 194 and S Langlaude 'On how to build a positive understanding of the child's right to freedom of expression' (200) 10(1) *Human Rights Law Review* 33, 36-37.

²⁴⁰ See UNICEF *The State of the World's Children 2003* (2003) 3.

²⁴¹ Article 13(1) of the CRC.

²⁴² See CM MacLeod 'A liberal theory of freedom of expression for children' (2004) 79 *Chicago-Kent Law Review* 55, 67-68, arguing as follows:

As children develop cognitive, emotional, and moral capacities, the range of material from which they need to be protected diminishes. Similarly, as children mature, the scope and content of their rights to expression increase. We can meaningfully ascribe rights of free expression to children without supposing either that all

expression includes the ‘freedom to seek, receive and impart information and ideas of all kinds’. Accordingly, the right to freedom of expression is closely related to the right to access to information as protected in article 17 of the CRC.

While article 17 originated from the Polish draft,²⁴³ the final letter of the provision took into account submissions made by other state and non-state actors.²⁴⁴ Following proposals made by the United States,²⁴⁵ article 17 recognises that the media performs a significant ‘educational function’ and binds States Parties to ‘ensure that the child has access to information from a diversity of sources, in particular by not impeding the free flow of information, as well as by assuring freedom of expression and opinion for all’. It binds States Parties to disseminate information in a manner consistent with the provisions of article 29 (which gives a detailed list of the aims of education). The command that article 17 be read with article 29²⁴⁶ demonstrates that access to information enhances the development of the child’s intellect and reasoning skills.²⁴⁷ Education, which (generally speaking) is an advanced form of disseminating information and sharing knowledge, should be aimed at the development of the child’s mental and physical capacities; and preparation of the child for responsible life in a free society.²⁴⁸

children, irrespective of age or maturity, have the same rights, or that the content of their rights cannot be differentiated from the content of the rights of adults.

See also A Etzioni ‘On protecting children from speech symposium: Do children have the same First Amendment rights as adults?’ (2004) 79 *Chicago-Kent Law Review* 3.

²⁴³ However, the Polish draft article on access to information was severely criticised as it sought limit children’s access to the media. See UNCHR *Question of a Convention on the Rights of the Child: Report of the Working Group on a Draft Convention on the Rights of the Child* E/CN.4/L.175 (1981) 19, where it was argued that the ‘mass media does more good than harm and therefore the article should be phrased in a more positive way, rather than in terms of protecting children from the mass media. States Parties should ensure freedom of information, so that children can take advantage of a diversity of opinion concerning all matters’.

²⁴⁴ See for example UNCHR *Question of a Convention on the Rights of the Child: Report of the Working Group on a Draft Convention on the Rights of the Child* E/CN.4/1982/Add. 1 (1982) 55-56 and UNCHR *Question of a Convention on the Rights of the Child: Report of the Working Group on a Draft Convention on the Rights of the Child* E/CN.4/1987/25 (1987) 7.

²⁴⁵ The US is reported to have insisted that the introductory part of article 17 should start by stating the following ‘[r]ecognising the important educational function performed by the mass media, States Parties shall ensure that the child has access to information from a diversity of sources, in particular by not impeding the free flow of information, as well as by assuring freedom of expression and opinion for all’. See UNCHR *Question of a Convention on the Rights of the Child: Report of the Working Group on a Draft Convention on the Rights of the Child* E/CN.4/1984/71 (1984) 11.

²⁴⁶ See article 17(a) of the CRC.

²⁴⁷ See, for instance, CRC General Comment No. 1 ‘The aims of education’ CRC/GC/2001/1 (2001) para 9, stating that ‘[e]ducation must be aimed at ensuring that essential life skills are learnt by every child and that no child leaves school without being equipped to face the challenges that he or she can expect to be confronted with in life’.

²⁴⁸ Article 29(1)(a) and (d) read with article 17 of the CRC.

Read together, articles 13, 17 and 29 revolve around the adage that ‘information is power’ as they seek to ensure that children are provided with all the information necessary for informed decision-making. The search for and access to information promotes the development of the child’s deliberative capacities and stimulates critical reflection on a range of issues.²⁴⁹ Access to information is a precursor not only to the child’s right to freedom of expression, but also to the child’s right to make rational decisions, particularly in the context of adolescents’ access to information concerning reproductive health. As noted by the Committee on the Rights of the Child, children ‘have the right to access adequate information essential for their health and development and for their ability to participate meaningfully in society. It is the obligation of States parties to ensure that all adolescent girls and boys, both in and out of school, are provided with, and not denied, accurate and appropriate information on how to protect their health and development and practise healthy behaviours’.²⁵⁰ Therefore, access to information is central to the holistic enjoyment of all rights, including rights to participation, health and development. Without access to relevant information, children cannot make informed decisions.

5.4 Analysis and interim conclusion

Most participation-related rights echo the prayer of child liberationists – particularly Farson and Holt – that children should enjoy the same freedoms enjoyed by adults. It is more telling that these rights originated from a draft initially submitted by the United States. At the drafting stage, the United States delegation submitted that ‘these rights are largely the same as those enjoyed by adults, although it is generally recognised that children do not have the right to vote. While children might need direction and guidance from parents or legal guardians in the exercise of these rights, this does not affect the content of the rights themselves’.²⁵¹ The *travaux préparatoires* signifies that many of these rights were simply ‘lifted’ from the ICCPR with little effort to relate them to children;²⁵² further suggesting that the drafters of the CRC were inclined to extend near-adult autonomy to children.

²⁴⁹ See CRC General Comment 9, para 37.

²⁵⁰ See CRC General Comment 4, para 26.

²⁵¹ Detrick (note 211 above) 233 and LeBlanc (note 148 above) 161.

²⁵² See UNCHR (note 115 above) 445-52.

At the general level, however, parents may restrict the child's participation rights if their exercise is not in the best interests of the child, disregards the child's evolving capacities or undermines the right to life, survival and development.²⁵³ In exercising their relative autonomy, adolescents may endanger their basic right to life, survival and development. For this reason, the child's exercise of autonomy rights is generally subject to his or her capacities. Parent-child conflicts are likely to emerge in this area of the law as children may refuse or accept services, such as medical treatment for instance, based on beliefs about which parents hold strongly divergent views. The question of whose view is to supersede that of the other is likely to bring courts into the family home to resolve parent-child conflicts and the courts are likely to be guided by the child's rights to life, survival and development.²⁵⁴ Overall, it is arguable that while international law confers relative autonomy on children in the area of participation rights, this autonomy is not absolute and does not match the levels of autonomy conferred on adults in other international human rights instruments.²⁵⁵ This approach leaves open the window for parental guidance and state intervention in the best interests of the child, especially where the child's exercise of autonomy jeopardises the right to life, survival and development.

6 PARENTAL RESPONSIBILITIES AND RIGHTS

Children live within families that play an important role in their enjoyment of human rights.²⁵⁶ The safety and protection which families and communities provide to their members is very

²⁵³ A Nolan *Children's Socio-economic Rights, Democracy and the Courts* (2011) Chapter 3, acknowledges that 'children's enjoyment of these admittedly broadly phrased rights may not be as expansive as that of adult-holders of similarly expressed rights under non-child-specific international human rights instruments'.

²⁵⁴ T Hammerberg 'The UN Convention on the rights of the child – and how to make it work' (1990) 12 *Human Rights Quarterly* 97, 100-01 and CP Cohen 'The relevance of theories of natural law and legal positivism' in M Freeman and P Veerman (eds) *Ideologies of children's rights* (1992) 53, 62 and LeBlanc (note 148 above) 157, demonstrating that the tension between child autonomy and parental guidance is mainly evident in the exercise, by children, of rights to privacy; access to health care; freedom of thought, conscience and religion; as parents also claim their rights to make decisions concerning health care, religious upbringing and education.

²⁵⁵ During the drafting process, the Chinese delegation, in direct contrast to the United States' proposal, insisted 'that freedoms of association, peaceful assembly and privacy could not be enjoyed by children in the same way as they are enjoyed by adults because the intellect of a child was not as developed as that of an adult, and therefore a child could only engage in activities commensurate with its intellect'. See UNCHR *Question of a Convention on the Rights of the Child: Report of the Working Group on a Draft Convention on the Rights of the Child* E/CN.4/1987/25 (1987) 27, para 117.

²⁵⁶ See Day of General Discussion on 'The role of the family in the promotion of the rights of the child' in Committee on the Rights of the Child, *Report on the fifth session* CRC/C/24, Annex V, (1994) 63; where it was stated that '[t]he family is an essential agent for creating awareness and preservation of human rights'; CRC General Comment 9, para 41 and CRC General Comment 7, para 15, stating that 'a young child's parents play a crucial role

vital, especially to children, as they constitute one of the most vulnerable social groups.²⁵⁷ International human rights instruments recognise the family as the natural and fundamental group unit of society entitled to protection by society and the state.²⁵⁸ The importance of parents and the family for the enjoyment of children's rights is evident from the large number of provisions committed to the regulation of family relationships.²⁵⁹ To begin with, the preambular provisions of both the CRC and the African Children's Charter emphasise the importance of the family for the growth and development of the child.²⁶⁰ This confirms that while the disaggregation of the rights of the child from those of the family is an important aspect of the CRC, the child's rights 'will be especially meaningful in the context of the [recognition of and respect for] the duties of parents and other members of the family'.²⁶¹

6.1 The state's duty to respect parental autonomy

The CRC identifies areas in which parents and families are entitled to exercise autonomy when performing their child-rearing responsibilities. In terms of articles 18(1) of the CRC and 20(1) of the African Children's Charter, '[p]arents have the primary responsibility for the upbringing and development of the child'. Under article 5 of the CRC, parents or guardians have the responsibility 'to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention'.²⁶² Article 5 of the CRC is one of the general provisions of the CRC and

in the achievement of their rights, along with other members of family, extended family or community, including legal guardians'. See also B Walsh 'The United Nations Convention on the Rights of the Child: A British view' (1991) 5 *International Journal of Law and the Family* 170, observing that article 5 of the CRC views children as part of a unit which is primarily responsible for their well-being and that children are do not belong to the state; and JE Doek 'Independent Human Rights Institutions for Children', Innocenti Working Paper 2008-06 (Florence: UNICEF Innocenti Research Centre, 2008) 19 and UNICEF *Championing children's rights: A global study of independent human rights institutions* for children (2013) 64, arguing that '[a] holistic approach to ensuring the realisation of child rights means that a child should be seen not only as an individual but also as a member of a family'.

²⁵⁷ See J Donnelly and R Howard 'Assessing national human rights performance: A theoretical framework' (1988) 10 *Human Rights Quarterly* 214, 223-24.

²⁵⁸ See preamble of the CRC, article 18(1) of the African Children's Charter, article 10 of the ICESCR, and articles 17 and 23(1) of the ICCPR.

²⁵⁹ See the preamble and articles 5, 7, 9, 18 and 27 of the CRC.

²⁶⁰ See paras 5 and 6 of the CRC and para 4 of the African Children's Charter.

²⁶¹ Committee on the Rights of the Child, 'General discussion on the role of the family in the promotion of the rights of the child' para 198 read with paras 193-95.

²⁶² Article 5 of the CRC. See also articles 9(2) and 11(4) of the CRC.

‘provides the general approach to be taken by States Parties to the relationship between the child, parents and the State in the exercise by the child of the rights recognised in the CRC’.²⁶³ Therefore, it is central in explaining the scope of parental responsibility, child participation and state intervention. It has been noted that article 5 of the CRC ‘separates out the roles of parents, children and state, and provides mechanisms for jurisprudential resolution of the hard cases that inevitably arise’.²⁶⁴

What immediately emerges from article 5 and 18(1) of the CRC is that parents and families, ahead of all others, are the default bearers of the responsibility to make decisions concerning the care, religion and education of the child. There is an element of autonomy from state control which attaches to this responsibility. Similarly, there is some level of authority associated with the duty to make decisions for or on behalf of children. It is arguable that in matters concerning family life, privacy and religion, parents enjoy great levels of autonomy from the state. This is why States Parties, in taking measures necessary for ensuring that children receive the necessary protection and support, are bound to take ‘into account the rights and duties of his or her parents, legal guardians or other individuals legally responsible for [the child]’.²⁶⁵ Every child is entitled ‘to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents’.²⁶⁶ The right to live with one’s parents is further supported by the command that ‘every child who is separated from one or both parents [has] the right to maintain personal relations and direct contact with both parents on a regular basis’.²⁶⁷

Article 9 of the CRC limits severely the power of the state to separate children from their parents against their will (the state may not separate children from the family without an order of a competent court and without giving all interested parties an opportunity to participate in the proceedings).²⁶⁸ Article 10(1) of the CRC binds the state to facilitate family reunification and to ‘ensure that the submission of a request [for reunification] has no adverse consequences for the members of their family’. The African Children’s Charter further provides that ‘[e]very child

²⁶³ Detrick (note 180 above) 115-16

²⁶⁴ J Sloth-Nielsen ‘Ratification of the United Nations Convention in the Rights of the Child: Some implications for South African law’ 11 *South African Journal on Human Rights* 401, 418.

²⁶⁵ Article 3(2) of the CRC.

²⁶⁶ Article 19(1) of the African Children’s Charter.

²⁶⁷ Article 19(2) of the African Children’s Charter. See also articles 10(2) and 9(3) of the CRC.

²⁶⁸ Article 9(1) and (2) of the CRC.

shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents'.²⁶⁹ The right to live with one's parents is further supported by the command that every child, even when 'separated from one or both parents has the right to maintain personal relations and direct contact with both parents on a regular basis'.²⁷⁰ These provisions echo not only the presumption that children enjoy their rights better when supported by adult members of the family, but that states should rarely exercise coercive intervention in matters concerning the child's family life, parental care and education. This approach has support from several provisions of the CRC and the African Children's Charter.

Article 5 of the CRC provides that 'States parties shall respect the rights and duties of parents...to provide appropriate direction and guidance in the exercise by the child of their rights'. According to article 14(2) of the CRC, 'States Parties shall respect the rights and duties of the parents...to provide direction to the child in the exercise' by the child of the right to freedom of thought, conscience and religion.²⁷¹ Article 11(4) of the African Children's Charter requires States Parties to 'respect the rights and duties of parents to choose for their children schools...to ensure the religious and moral education of the child in a manner consistent with the evolving capacities of the child'. According to the African Children's Charter, the child's right to privacy is recognised 'provided that parents or legal guardians have the *right* to exercise reasonable supervision over the conduct of their children'.²⁷² These rights can be claimed against the state (and other persons) and they impose on parents duties to provide to the child appropriate care and guidance in day-to-day activities.

Further, the provisions referred to above reflect not only the vulnerability and dependence of children on adult members of the family, but also the realities of family life. As explained in the course of discussions leading to the adoption of the CRC, the reason behind conferring on parents the primary responsibility to care for their children was 'to protect parents against excessive intervention of the state and also to indicate that parents cannot expect the state always to intervene, because the upbringing and development of their child is their primary

²⁶⁹ Article 19(1) of the African Children's Charter. See also articles 9(3) and 10(2) of the CRC.

²⁷⁰ Article 19(2) of the African Children's Charter.

²⁷¹ See also articles 9(2) and (3) of the African Children's Charter.

²⁷² Article 10 of the African Children's Charter.

responsibility’.²⁷³ International human rights law reinforces the idea that intact families play an important role in the enjoyment by children of their rights.²⁷⁴ Accordingly, value judgments about the necessary levels of parental support, and the ages at which children are deemed capable of making decisions concerning religion, privacy and education, are largely made in the family and rarely regulated by the law.

At a deeper level, however, most of the provisions cited above portray the family as a mini-state in which parents are entitled to exercise wide authority in making decisions affecting children. This is most evident from provisions which state that States Parties should ‘respect’ the rights and responsibilities of parents responsible for guiding children seeking to exercise the enumerated rights.²⁷⁵ As a negative concept, the duty ‘to respect’ fits in well with the traditional liberal view of the family as a private institution. Generally, the duty to ‘respect’ implies that parents have wide powers to determine what constitutes ‘appropriate child care’ and to provide for the material needs of their children. To this end, the Human Rights Committee once made the following observation:

Responsibility for guaranteeing children the necessary protection lies with the family, society and the State. Although the Covenant does not indicate how such responsibility is to be apportioned, *it is primarily incumbent on the family*, which is interpreted broadly to include all persons composing it in the society of the State Party concerned, and *particularly on the parents*, to create conditions to promote the harmonious development of the child’s personality and his enjoyment of the rights recognised in the Covenant.²⁷⁶

²⁷³ Detrick (note 211 above) para 91.

²⁷⁴ This approach is echoed in JP Lash *Eleanor: The years alone* (1972) 81, where Eleanor Roosevelt is quoted as saying ‘[w]here after all do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world....Unless these rights have meaning there, they have little meaning elsewhere’.

²⁷⁵ For a detailed discussion of the state’s duty to respect the rights of parents, see CRC General Comment 4, para 18.

²⁷⁶ See ICCPR General Comment 17, para 6. See also article 16 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol on San Salvador) providing as follows:

Every child, whatever his parentage, has the right to protection that his status as a minor requires from his family, society and the state. Every child has the right to grow under the protection and responsibility of his parents, save in exceptional, judicially-recognised circumstances, a child of young age ought not to be separated from his mother. Every child has the right to free and compulsory education, at least in the elementary phase, and to continue his training at higher levels of the educational system.

The duty to ‘respect’ represents the state’s conventional approach to horizontal relationships and emphasises the fact that when parents exercise their responsibility in the context of daily care and education of children, they should be insulated from arbitrary interference by the state.²⁷⁷ As Toope once argued, ‘for generations, a powerful myth shaped attitudes in many cultures; the myth contained a vision of the family as a purely ‘private’ sphere which was, and should be, shielded from public scrutiny’.²⁷⁸ Article 5 codifies this ‘myth’ or rather ‘reality’. Some scholars have, correctly in my view, argued that due to the privacy of the family, the state should intervene coercively only with the great reluctance.²⁷⁹ Nonetheless, parental autonomy is limited on two fronts, first by the state’s duty to intervene (in the best interest of the child) to protect abused or exploited children’s basic right to life, survival and development and, second, by the evolving capacities of the child. Whether these considerations, in practice, actually limit parental autonomy is another question.

In the context of the child’s right to religion, for instance, states parties must ‘respect the rights and duties of the parents to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child’.²⁸⁰ This right equivocates between recognising complete religious freedom for the child and reinforcing the traditional parental right to guide children on religious matters. During the drafting process, the idea that the child could

²⁷⁷ For other relevant provisions on parental autonomy from state interference, see article 17 of the ICCPR prohibiting arbitrary or unlawful interference with the family; articles 18 (4) and 24 of the ICCPR, the latter particularly deals with the rights of the child within the family; and articles 13(3) of the ICESCR and 11(4) of the African Children’s Charter, binding States Parties to ‘respect the liberty of parents...to choose for their children schools...and to ensure the religious and moral education of their children in conformity with their own convictions’.

²⁷⁸ S Toope ‘The Convention on the Rights of the Child: Implications for Canada’ in M Freeman (ed) *Children’s rights: A comparative perspective* (1996) 47. On the public-private divide and how it limits state intervention in the private family, see DJ Herring ‘Exploring the political roles of the family: Justifications for permanency planning for children’ (1995) 26 *Loyola University of Chicago Law Journal* 183, 243; M Freeman ‘Feminism and Child Law’ in J Bridgeman and D Monk (eds) *Feminist Perspectives on Child Law* (2000) 19, 20; H Lim and J Roche ‘Feminism and children’s rights’ in J Bridgeman and D Monk (eds) *Feminist perspectives on child law* (2000) 227, 229 and 247; F Olsen, ‘Children’s rights: Some feminist approaches to the United Nations Convention on the Rights of the Child’ 6(1) *International Journal of Law and Family* 192, 194–95 and 208, stating that ‘family-based privacy rights have historically resulted in a substantial loss of individual rights, especially for women and children’; and BB Woodhouse ‘The dark side of family privacy’ (1999) 67 *George Washington Law Review* 1247, 1251–259.

²⁷⁹ MM Coady and CAJ Coady “‘There ought to be a law against it’: Reflections on child abuse, morality and law’ in P Alston, S Parker and J Seymour (eds) *Children, rights and the law* (1992) 126, 129.

²⁸⁰ Articles 14(2) of the CRC. See also article 9(2) of the African Children’s Charter.

choose his or her religion was seen as threatening parental rights²⁸¹ and the working group had to drop statements (relating to the child's freedom to choose their own religion) as a means of promoting consensus between delegates.²⁸² Thus, in guiding their children on matters relating to religion, parents have relative autonomy from state control, but this autonomy is limited by the evolving capacities of the child²⁸³ and the negative dimension of the right to life, survival and development. Thus, parents may not require children to adhere to religious beliefs which threaten their basic right to life, survival and development.

6.2 The state's duty to intervene in the best interests of the child

According to the CRC, parental rights and responsibilities are subject to internal qualifiers that permit state intervention in the best interests of the child. The CRC recognises the parent's duty to offer 'appropriate guidance and direction' in the exercise by the child of his or her rights. The word 'appropriate' implies that parental autonomy and family privacy are no grounds for perpetuating the private/public divide in ways that mask existing inequalities and unjust power relations that have confronted women and children for centuries.²⁸⁴ The shift from unlimited parental autonomy from the state to reasonable supervision of the child finds expression in the terms 'guide' and 'direct' (in article 5) which connote a shift from the parent as 'sanctioner' to

²⁸¹ See UNCHR *Report of the Working Group on the Question of a Convention on the Rights of the Child* UN Doc. E/CN.4/1983/62, (1983) para 55, where it was observed that 'in many countries, a child follows the religion of his parents and does not generally make a choice of his own'; Cohen (note 254 above) 63; and *Report of the Working Group* (1988) 12, where a Moroccan observer is quoted as stating that the idea that a child could freely choose or change his or her religion 'ran counter to the principles of Muslim law: the child of a Muslim was bound to be a Muslim, and in order to renounce that fact, he had to conform to the rules of Muslim law on the matter'; United Nations General Assembly (UN GA) C.3 (Third Committee) 'Summary record of the 37thth meeting' A/C.3/37/SR.37 (1989) 4-7; 'Summary record of the 38th meeting' A/C.3/44/SR.38 (1989) 7; and 'Summary record of the 44th meeting' A/C.3/44/SR.44 (1989) 16, emphasising the child's right to exercise, but not to choose his or her religion; LeBlanc (note 148 above) 166; N Cantwell 'The origins, development and significance of the United Nations Convention on the Rights of the Child' in Detrick (note 211 above) 19, 26 and N Cantwell 'The headscarves' affair' (1989) 6 *International Children's Rights Monitor* 15, 15.

²⁸² LeBlanc (note 148 above) 169-70.

²⁸³ Reference to the 'evolving capacities of the child' in the context of the right to religion is potentially liberating and implies that parental guidance should not be as heavy-handed as to constitute compulsion. This means that parents should guide children in a manner that leaves open the room for the child to choose his or her own religion when capacity justifies religious choice. Under the CRC, parental rights should be exercised for the purposes of enabling the child to enjoy the rights recognised in this instrument. Parental rights are not necessarily an embodiment of distinct parental interests as the responsibility that parents have should broaden children's capacity to exercise their rights.

²⁸⁴ For an attack on the private/dichotomy, see M Freeman 'Taking children's rights more seriously' in P Alston, S Parker and J Seymour (eds) *Children, rights and the law* (1992) 52, 55-56.

parent as ‘enabler’.²⁸⁵ Similarly, the phrase ‘appropriate direction and guidance’ effectively removes any suggestion that parents have unlimited power to provide any kind of direction they deem fit, and it introduces an objective element of appropriateness.²⁸⁶ This ensures that the protection of the rights of the child would not be solely left to the wishes of the family without any corresponding protection whatsoever from the state. As observed by the Canadian delegation during the drafting process of the CRC, the rights of the child should not ‘be left solely to the wishes of the family, without any protection whatsoever from the State; in other words in protecting the family from the State, the family must not be given arbitrary control over the child. Any protection from the State given to the family must be equally balanced with the protection of the child within the family’.²⁸⁷

Parental autonomy from the state does not mean that parents have the right to exploit, abuse and neglect children living under their control. The disaggregation of children’s rights from parental rights shows the international recognition of the fact that family privacy may become a scapegoat for perpetuating oppressive power relations between parents and children.²⁸⁸ Thus, parental autonomy, just like child participation rights, is subject to permissible limits, especially where the child has suffered or is likely to suffer psychological, emotional or physical harm. Families are only protected against ‘arbitrary’ interference and the state may intervene if parents’ actions

²⁸⁵ Van Bueren (note 97 above) 73 and 77-86.

²⁸⁶ See also P Alston ‘The legal framework on the Convention on the Rights of the Child’ (1992) 91/2 *United Nations Bulletin on Human Rights* 1, 15. See also CRC General Comment 8, para 28, where the Committee on the Rights of the Child observed that ‘interpretation of “appropriate” direction and guidance must be consistent with the whole Convention and leaves no room for justification of violent or other cruel or degrading forms of discipline’.

²⁸⁷ See UNCHR *Question of a Convention on the Rights of the Child: Report of the Working Group on a Draft Convention on the Rights of the Child* E/CN.4/1987/25 (1987) 25 and LeBlanc (note 148 above) 113.

²⁸⁸ and B Cass ‘The limits of the public/private dichotomy: A comment on Coady & Coady’ in P Alston, S Parker and J Seymour (eds) *Children, rights and the law* (1992) 140, 142-43, arguing that-

What the Convention does is firstly to question the public/private dichotomy; secondly, and even more fundamentally, to disaggregate the rights of children from the rights of ‘families’, to constitute children as independent actors with rights vis-à-vis their parents and vis-à-vis the state’. In this way, the rights of parents to deal with their children as they define permissible and desirable are constrained and circumscribed....The power relations of intimate life cannot be understood without reference to the relative position of men and women, adults and children in the labour market, or without reference to the laws regulating marriage, divorce, child protection, domestic violence...[T]he right to privacy...is [often inappropriately construed as] no more than a protection of patriarchal rights to maintain relations of inequality and dominance under the guise of family inviolability. The challenging of the private/public dichotomy is a challenge to the market processes and legal systems which construct gender and age vulnerabilities, and then fail to provide protection or redress.

endanger the child's right to life, survival and development.²⁸⁹ For instance, article 9(1) of the CRC authorises States Parties, subject to judicial review, to separate children from their parents if 'such separation is necessary for the best interests of the child'.²⁹⁰ Children separated from parents in this sense have the right to maintain direct and regular contact with both parents only if such contact is not 'contrary to the child's best interests'. Further, article 20(1) of the CRC provides that '[a] child deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State'. Article 21 of the CRC requires 'States Parties that recognise and/or permit the system of adoption' to take multiple actions to 'ensure that the best interests of the child shall be the paramount consideration'. These provisions, combined with the general principle of the best interests of the child, the child's protection rights and the right to life, survival and development, permit States Parties to limit parental autonomy if it is exercise to the detriment of the child's right to life, survival and development. This means that even in areas, such as family life, privacy, education and religion, where they have considerable autonomy from state control, parents are subject to the authority of the state.

To be 'appropriate', the parent's exercise of the duty to guide and direct the child should be directed towards promoting respect for the rights of the child, in light of the child's right to life, evolving capacities and best interests.²⁹¹ The CRC establishes a direct relationship between the child and the state and challenges the historical assumption that parents and the family have rights of ownership over children.²⁹² Thus, the state's duty to intervene is invoked when the guidance and direction given by the parent is inconsistent with either the child's protection rights the evolving capacities of the child. In this light, it is important to investigate the role played by the concept of the evolving capacities of the child in locating the balance between child participation, parental responsibility and state intervention.

²⁸⁹ On the need to redefine the boundaries of the private sphere, see CA Mackinnon, *Towards a feminist theory of the state* (1989) 190-91 and R Gavison 'Feminism and the public/private distinctions' (1992) 45(1) *Stanford Law Review* 1-45.

²⁹⁰ See also article 19(1) of the African Children's Charter.

²⁹¹ See CRC General Comment 7, para 16, stating that '[t]he responsibility vested in parents and other primary caregivers is linked to the requirement that they act in children's best interests'.

²⁹² See generally B Holmberg and J Himes 'Parental Rights and Responsibilities' in A Petren and J Himes (eds) *Children's Rights: Turning principles into practice* (Radda Barnen/UNICEF, Stockholm, 2000).

6.3 The evolving capacities of the child

Articles 5 and 14(2) of the CRC and 9(2) and 11(4) require that parental responsibility, child participation and state intervention be exercised in ‘a manner consistent with the evolving capacities of the child’. Article 12(1) of the CRC recognises the child’s evolving capacities through the twin concepts of ‘age’ and ‘maturity’. The concept of the evolving capacities of the child ground both parental control and the child’s relative autonomy. Therefore, the principle of the evolving capacities of the child plays an important role in maintaining the balance between child participation, parental responsibility and state intervention.²⁹³ It recognizes that children experience rapid growth in their ‘physical, cognitive, social and emotional functioning’; pass through zones of rational autonomy before attaining adulthood and vary in the ages at which they become capable of making particular decisions.²⁹⁴

As an emancipatory concept, the ‘evolving capacities of the child’ seeks to broaden youth autonomy and encourage children to assume responsibility for their actions. With age and maturity, the consequences of children’s decisions increase and diversify until they reach the age of majority; when they will fully exercise the totality of their rights. As the child’s capacities evolve, the child plays a central role in defining what is in his or her best interest; authorising

²⁹³ G Lansdown *The evolving capacities of the child* (UNICEF Innocenti Research Centre, Florence; 2005) 15.

²⁹⁴ See CRC General Comment 4, paras 1 and 7; and CRC General Comment 7, para 17, where the Committee on the Rights of the Child authoritatively made the following remarks:

Article 5 draws on the concept of ‘evolving capacities’ to refer to processes of maturation and learning whereby children progressively acquire knowledge, competencies and understanding, including acquiring understanding about their rights and about how they can best be realized. Respecting young children’s evolving capacities is crucial for the realization of their rights and especially significant during early childhood, because of the rapid transformations in children’s physical, cognitive, social and emotional functioning, from earliest infancy to the beginnings of schooling. Article 5 contains the principle that parents (and others) have the responsibility to continually adjust the levels of support and guidance they offer to a child. These adjustments take account of a child’s interests and wishes as well as the child’s capacities for autonomous decision-making and comprehension of his or her best interests. While a young child generally requires more guidance than an older child, it is important to take account of individual variations in the capacities of children of the same age and of their ways of reacting to situations. Evolving capacities should be seen as a positive and enabling process, not an excuse for authoritarian practices that restrict children’s autonomy and self-expression and which have traditionally been justified by pointing to children’s relative immaturity and their need for socialization. Parents (and others) should be encouraged to offer ‘direction and guidance’ in a child-centred way, through dialogue and example, in ways that enhance young children’s capacities to exercise their rights, including their right to participation (art. 12) and their right to freedom of thought, conscience and religion (art. 14).

courts, for instance, to override parental preferences.²⁹⁵ Where a child is sufficiently mature to be rationally autonomous in making a particular decision, it would be inconsistent with the concept of the ‘evolving capacities of the child’ to insist that her views be co-terminus with parental preferences.²⁹⁶ This aspect of the evolving capacities was discussed in detail above and it is not necessary to revisit the main submissions made in the relevant section.²⁹⁷

The concept of the ‘evolving capacities of the child’ also grounds parental control and state intervention. The primary responsibility of parents is to protect children from the immaturity of their youth and to help them make difficult decisions in life. As discussed above,²⁹⁸ the CRC and the African Children’s Charter recognise children’s vulnerability and immaturity as grounds for entrenching children’s right to special protection. Both the child’s protection rights and the negative aspect of the basic right to life constitute solid reasons for limiting the child’s desire to exercise personal autonomy in the decision-making process. The protective dimension of the evolving capacities of the child entails, among others, protection in making personal decisions that directly affect the child’s own life, survival and development. In many contexts, the child’s undeveloped capacities require the parent and the state to shield the child against unsound personal decisions.²⁹⁹ In most cases, the child’s long term interests are not promoted by giving

²⁹⁵ See L Krappman ‘The weight of the child’s view (Article 12 of the Convention on the Rights of the Child)’ (2010) 18 *International Journal of Children’s Rights* 501, 506-09 and CRC General Comment 4, para 17, where the Committee on the Rights of the Child explains that ‘[a]rticle 5 contains the principle that parents (and others) have the responsibility to continually adjust the levels of support and guidance they offer to a child. These adjustments take account of a child’s interests and wishes as well as the child’s capacities for autonomous decision-making and comprehension of his or her best interests’.

²⁹⁶ R Hart ‘The evolving capacities for children to participate’ in V Johnson, E Ivan-Smith, G Gordon, P Pridmore and P Scott (eds) *Stepping forward: Children and young people’s participation in the development process* (1998) 27-31. At para 17 of CRC General Comment 7, the Committee on the Rights of the Child observed as follows:

Article 5 contains the principle that parents (and others) have the responsibility to continually adjust the levels of support and guidance they offer to a child. These adjustments take account of a child’s interests and wishes as well as the child’s capacities for autonomous decision-making and comprehension of his or her best interests. Evolving capacities should be seen as a *positive and enabling process*, not an excuse for authoritarian practices that restrict children’s autonomy and self-expression and which have traditionally been justified by pointing to children’s relative immaturity and their need for socialization. Parents (and others) should be encouraged to offer “direction and guidance” in a child-centred way, through dialogue and example, in ways that enhance young children’s capacities to exercise their rights, including their right to participation (art 12).

²⁹⁷ See section 5.3.1.2 above.

²⁹⁸ Section 5.2 above.

²⁹⁹ Developmental psychologists and neuroscientists have made significant strides in demonstrating that children, especially the very young, generally have *limited* capacity to engage in the reasoning process and to make informed

effect to his or her present desires and preferences. In an adult's case, present autonomy takes precedence over future good (the adult has the right to choose). With children, future good *often* takes precedence over present autonomy (adults have the right to override the child's free choice if such choice threatens the child's life and gradual development into responsible adulthood).

There is hardly any consensus about the nature and extent of the protection to which children are entitled in the context of personal decision-making. For young children, most decisions are taken by adults exercising parental responsibilities and rights. Under the theories of paternalism, the fiduciary model and the interest theory of rights, Chapter Two demonstrated that the rationale for ceding control of young children to parents is that children generally lack the capacity to make decisions in ways that maximise their stock of the good.³⁰⁰ Through the idea of the evolving capacities, international law recognises that an immature child needs to be protected from their own actions when such actions threaten the child's basic right to life, survival and development. The protective dimension of the evolving capacities of the child does not only ensure that incompetent children are not given the burden to make complex decisions in the life course, but also prevents parents from putting children in the middle of adult conflicts.³⁰¹ The fact that children's capacities are 'evolving' authorises parents to invoke the protective dimension of the child's evolving capacities to evaluate whether the child's views promote the present and future good of the child.

decisions in light of the information at their disposal. See T Grisso 'The competence of adolescents as trial defendants' (1997) 3 *Psychology, Public Policy and Law* 3, 8; T Grisso 'What we know about youth's capacities' in T Grisso and RG Schwartz (eds) *Youth on trial: A developmental perspective on juvenile justice* (2000) 267-269; D Weinberger 'A brain too young for old judgment' *New York Times*, 10 March 2001, A13; ER Sowell, PM Thompson, KD Tessner, and AW Toga (eds) 'Mapping continued brain growth and gray matter density reduction in dorsal frontal cortex: Inverse relationships during post-adolescent brain maturation' (2001) 21(22) *The Journal of neuroscience* 8819, 8819; and ER Sowell, PM Thompson, CJ Holmes, TL Jernigan and AW Toga 'In vivo evidence for post-adolescent brain maturation in frontal and striatal regions' (1999) 2(10) *Nature Neuroscience* 859.

³⁰⁰ Sections 3.1, 3.2, 4.1, 4.2 and 5.2 of Chapter Two.

³⁰¹ See I Thery 'The interest of the child and the regulation of the post-divorce family' in C Smart and S Sevenhuijsen (eds) *Child custody and the politics of gender* (1989) 78, 92, argues that '[m]aking the child responsible in a situation of which it is the subject, and which runs counter to [the child's] basic wish for the couple to stay together, is contrary to the principles which justify the legal incapacity of the minor; it assumes the child is able to determine for themselves where their long-term interest lies'; and RE Emery 'Children's voices: Listening – and deciding – is an adult responsibility' (2003) 45 *Arizona Law Review* 621, 623; lamenting that children are often put in the centre of parental disputes. She contends that requiring the child to participate is like forcing the child to make a difficult decision thus: 'Your parents are at war about where you should live. Your Mom and Dad, and their lawyers, only want you to say what they want to hear. The custody evaluator feels strongly both ways. The mediator wants to remain neutral. The guardian *ad litem* is not sure what to do. The judge would rather not decide. Why don't you, child, tell us adults what to do?'

However, the protective element of the evolving capacities of the child does not justify the total exclusion of children from the decision-making world as this undermines the participatory rights of children, particularly adolescents.³⁰² In Freeman's words, 'to take children's rights more seriously, requires us to take more seriously both the protection of children and recognition of their autonomy, both actual and potential'.³⁰³ Finally, whether the exercise of parental responsibility is 'appropriate' largely depends on whether it is justified by the child's (in)capacity to make the decision in question. To be appropriate, parental responsibility should protect children from exercising autonomy rights during earlier stages of the life course; enhance their capacities for autonomy as they grow up and allow for qualified autonomy from parental control when the child acquires the capacities to make particular decisions in their best interests.

7 CONCLUSION

Both the CRC and the African Children's Charter portray the child as an independent person entitled to rights emanating from his or her separate personhood as an individual. This marks a departure from entirely protective approaches to children's rights and allows the child to claim their rights against parents and the state. At the level of general principles, the CRC and the African Children's Charter entrench the principles of non-discrimination; child participation; the best interests of the child and life, survival and development. The latter two principles and the notion of the evolving capacities of the child perform an important function in reconciling the tension between child participation, parental responsibility and state intervention. In particular, the negative dimension of the right to life plays an important role in balancing the competing interests of children, parents and the state as all of them may not exercise their rights in ways that endanger the child's basic right to life, survival and development.

³⁰² See generally J Miller *All right at home: Protecting respect for the human rights of children in the family* (1998).

³⁰³ M Freeman 'Whither children: Protection, participation, autonomy?' (1994) 22 *Manitoba Law Journal* 307, 324. See also CRC General Comment 7, para 2(c) stating that young children should be recognised 'as social actors from the beginning of life, with particular interests, capacities and vulnerabilities, [and] requirements for protection, guidance and support in the exercise of their rights'.

In this chapter, it was argued, first, that mature children have relative autonomy rights in the context of child participation. These rights enable children who have acquired capacities for rational autonomy to make independent decisions that are in their best interests. Ultimately, the nature and complexity of the matter in question and the evolving capacities of the child perform an important role in determining whether or not the child possesses the capacity to make independent decisions in their best interests. This autonomy is limited by the duties of parents to guide and direct children, and the state's power to intervene when the child lacks the capacity to make rational decisions in their own best interests. Further, it was argued that the state largely enjoys the autonomy to take measures to prevent the abuse, neglect and exploitation of children. In the context of child protection rights, the state removes decision-making powers from parents and children as all the prohibitions are prescribed by law. The importance of child protection rights is evident from the commitment with which international law seeks to ensure that children are not victims of certain harmful practices. The child's basic right to life, survival and development grounds all the protective measures taken by the state against parents and children.

Finally, it was argued that parents have autonomy in matters concerning family life, privacy, religion and education as they are the main bearers of the duty to guide children in these areas of the law. Absent child abuse, neglect and exploitation, the state has no business interfering in the family in this regard. Nonetheless, the powers which parents have in these areas are limited by the child's evolving capacities as this concept shifts the responsibility for the exercise of rights from the parent to the child. Parental powers, too, are limited by the best interests of the child; particularly the child's interests in life, survival and development. In the next chapter, this thesis addresses the extent to which the legal protection of children's rights, parental responsibility and state intervention in South Africa are consistent with the normative standards laid down in the CRC and the African Children's Charter.

CHAPTER FOUR: CHILDREN'S RIGHTS, PARENTAL RESPONSIBILITY AND STATE INTERVENTION UNDER SOUTH AFRICAN LAW

1 INTRODUCTION

Chapter Three traced the historical development of children's rights, explained the significance of the Convention on the Rights of the Child (CRC)¹ and demonstrated that international law recognises the separate personhood of the child and disaggregates children's rights from parental or family rights. It also explored the general principles and different categories of children's rights in international law, emphasising the indivisibility and mutually reinforcing nature of all rights and describing the implications of these rights for parental responsibility and state intervention in the family. In the process, the child's protection rights, best interests and evolving capacities emerged as some of the key factors to be considered when locating the balance between child participation, parental responsibility and state intervention.

The adequacy of South African family law should be evaluated against the normative standards enshrined in the CRC and the African Charter on the Rights and Welfare of the Child (African Children's Charter).² From the Interim Constitution through the 1996 Constitution to the Children's Act, Parliament has sought to align domestic child law with international and regional normative standards. However, most of the changes being made as a result of the country's international obligations also codify common law principles which evolved in the courts over long periods of time. Ultimately, the Constitution, international law and the common law governing the parent-child relationship provide a broad child rights framework in terms of which the meaning and scope of parental responsibility is determined by the child's rights and needs. The new image of the family focuses on the child as a holder of rights and parents as holders of

¹ United Nations Convention on the Rights of the Child, GA Res 44/25, annex, 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49 (1989) entered into force 2 September 1990 (hereafter the CRC).

² African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990) entered into force 29 November 1999 (hereafter the African Children's Charter).

responsibilities for the care of the child.³ In the two sections which follow this introduction, this chapter discusses the historical development of children's rights in South Africa and explains why it is important to regard children as holders of rights at the national level. This is followed by an analysis of the status of general principles of children's rights under the South African legal system.

Children's rights may generally be categorised into protection, participation and provision rights.⁴ The domestic protection of the first two sets of rights and their implications for the relationship between child participation, parental responsibility and state intervention are discussed in this chapter. Provision rights have little to do with this study and will not be discussed in any detail. In terms of the Constitution, children are entitled to certain autonomy-related rights such as privacy, dignity, freedom and security of the person, and reproductive health. The scope of these rights and how they relate to parental responsibility and state intervention in decision-making are discussed in detail below. Finally, the chapter investigates how and to what extent South African common and constitutional law protect parental responsibility and state intervention. This includes an analysis of the extent to which parental responsibility limits children's autonomy-related rights and the grounds upon which the state may intervene to limit the arbitrary exercise of parental responsibility. In the process, this chapter demonstrates the extent to which South African law recognises the liberating effect of the child's developing maturity.

³ See B Van Heerden 'How the parental power is acquired and lost' in B Van Heerden, A Cockrell and R Keightley (eds) *Borberg's law of persons and the family* 2 ed (1999) 313, 314, who argues as follows:

The twenty-first century has seen a dramatic shift in emphasis from the notion of the rights of parents vis-à-vis their children (and the duties of parents to care for and protect their children) to the idea of children as bearers of their own rights and entitlements, especially the right to self-determination. Increasingly, children have been recognised as independent beings, having positive claims against both their parents and the state for the protection and implementation of a wide range of child-oriented needs and interests, while at the same time being subject to certain disabilities relative to their age and immaturity.

⁴ Section 5 of Chapter Three.

2 THE HISTORICAL DEVELOPMENT OF CHILDREN'S RIGHTS IN SOUTH AFRICA

Stretching for a period exceeding 40 years, the apartheid system institutionalised discrimination against children categorised as 'non-white'. Among the classic features of the apartheid era were a substandard education system for 'non-whites'; the migrant labour system; high infant and maternal mortalities; children languishing in prisons or exposed to extreme forms of violence, abuse, neglect, degradation and exploitation.⁵ As a result, students organised political protests in the mid-1970s (the most prominent of which were the 1976 Soweto Uprising)⁶ and the 1980s. These developments raised consciousness about children's rights and culminated, in 1987, with the Harare conference on 'Children, Repression and the Law in Apartheid South Africa'. This was followed, in 1992, by the International Summit on the Rights of Children. The Summit, attended by more than 200 children from across the country, adopted the Children's Charter of South Africa – clearly one of the most comprehensive soft law documents on children's rights.⁷ These developments shaped the mindset of the drafters of the Interim Constitution.

During the drafting of the Interim Constitution, negotiators raised concerns that 'two pages are devoted to the rights of criminals, but two lines to the rights of children'.⁸ This led to the expansion of the provisions entrenching children's rights. Academic scholarship on the

⁵ See B Grant and P Schwikkard 'People's courts?' (1991) 7 *South African Journal on Human Rights* 304, 307 and A Cockrell 'The South African Bill of Rights and the "duck/rabbit"' (1997) 60 *Modern Law Review* 513, 516.

⁶ On 16 June 1976, the Soweto Uprisings led to the brutal killing of over 500 children, including the iconic 12-year old student activist Hector Petersen. The uprisings challenged the myth that children are passive objects and placed them at the centre of the liberation struggle. Against this background, South Africa's ratification of the CRC, on 16 June 1995, was intended to coincide with the anniversary of the 1976 killings and constituted an open acknowledgement of the immense contribution children made to the struggle against apartheid. For a detailed analysis of the circumstances that led to student uprisings and the historical development of children's rights, see The Presidency of the Republic of South Africa, *Situation analysis of children in South Africa* (2009) 1-3.

⁷ Launched on 1 June 1992 at the Children's Summit of South Africa, the Children's Charter contains 50 rights. For an account of relevant events, see generally M King 'South African children speak out' (1993) 1 *The international Journal of Children's Rights* 71 and M King 'Against children's rights' (1996) *Acta Juridica* 28. See also A Lloyd 'A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the child' (2002) 2 *African Human Rights Law Journal* 11, 15, pointing out that '[t]here is a continuing need for children to be given a "voice" by way of a constitutional order or legislative provision. The way has been somewhat pathed by South Africa and the invocation of the 'children's charter', which was created predominantly by children, and which thus no longer can be criticised as solely the thought process of adults. Children drafted the charter, sat at all the meetings of the ministers and provided numerous resolutions'.

⁸ L Du Plessis and H Corder *Understanding South Africa's transitional Bill of Rights* (1994) 186.

emergence of children's rights demonstrates that there was consensus, across the political spectrum, about the fact that the history of child abuse, neglect, exploitation, and poor education had to stop.⁹ As observed by Sloth-Nielsen, it was not politically correct for any party to oppose the inclusion of children's rights in the constitution.¹⁰ Further, the near universal support for children's rights emerged not only from children's positive contribution to the struggle against apartheid, but also from the sentimentalism that characterised the lobby for the constitutional recognition of these rights.¹¹ Despite the fact that they had been actively involved in the struggle against apartheid, children were viewed as 'acutely vulnerable' and portrayed as persons in need of special protection.¹²

While section 30 of the Interim Constitution contains a number of children's rights, it is dominated by socio-economic and protection rights. It also protects the child's rights to parental care and the best interests of the child.¹³ There is a notable absence of the right to family life¹⁴ as

⁹ See *PAC submission on children's rights in the Constitutional Assembly Theme Committee 4: Fundamental Rights, Party Submissions as at 5 May 1995: Children's Rights* 27, observing that '[o]ur country has had a bad history of ill-treating children, such as abuse, neglect, child labour especially on farms, the spectre of street kids and gaols full of children and so on'.

¹⁰ For a detailed discussion of some of these points, see J Sloth Nielsen 'Chicken soup or chainsaws: Some implications of the constitutionalisation of children's rights in South Africa' (1996) *Acta Juridica* 6, 10-12.

¹¹ N Cantwell 'Are children's rights still human?' in A Invernizzi and J Williams (eds) *The human rights of children: From visions to implementation* (2011) 37, 43, describes sentimentalism in the following terms:

The 'charity approach' is founded in large part on sentimentalism: arousing sympathy for individuals or groups who involuntarily find themselves in difficult situations and who, because of their perceived vulnerability and helplessness, are deemed to deserve assistance. Not unnaturally, the children's sphere has been notoriously exploitable from this sentimentalist standpoint. Regrettably, even in the 'rights' era, this exploitation continues in far too many instances.

¹² See J Sloth-Nielsen 'The contribution of children's rights to the reconstruction of society: Some implications of the constitutionalisation of children's rights in South Africa' (1996) 4(4) *The International Journal of Children's Rights* 323, 327-28, pointing out that-

[t]he image of childhood engendered by the "sentimental" notion of children's rights (in sharp contrast to the actual experiences of children during the struggle) is one of powerless, but grateful recipients of the benefaction of constitutional rights. This sentimental discourse has continued to hold sway to a degree in children's rights debates in parliament, amongst politicians and to some degree at other levels of government.

¹³ See section 30(1)-(3) of the Interim Constitution, Act 200 of 1993.

Section 30(3) provides that 'for the purposes of this section, a child shall mean a person under the age of 18 years, and in all matters concerning such child his or her best interest shall be paramount'.

¹⁴ See also J Sinclair 'Family Rights' in D van Wyk, J Dugard, B de Villiers and D Davis (eds) *Rights and Constitutionalism: The new South African legal order* (1994) 502, 521 and J Sloth-Nielsen and B Van Heerden 'The constitutional family: Developments in South African family law jurisprudence under the 1996 Constitution' (2003) 17(2) *The International Journal of Law, Policy and the Family* 121, 121-23.

well as direct child participation rights,¹⁵ but children were entitled to autonomy rights that are available to ‘everyone’ under the general provisions of the Interim Bill of Rights. Section 7(1) of the 1996 Constitution (hereafter the Constitution)¹⁶ provides that the Bill of Rights ‘enshrines the rights of *all people* in our country’ and most of the rights in the Bill of Rights belong to ‘everyone’, including children. Thus, children’s rights are protected at two levels. First, they are protected under the general provisions of the Bill of Rights and, second, they are specifically protected in section 28 which applies only to children.¹⁷

Section 28 of the Constitution contains rights specifically applicable to children.¹⁸ Like its predecessor, the 1996 Constitution proclaims that children are entitled to protection, provision and autonomy rights – the latter forming part of the rights to which ‘everyone’ is entitled. It also proclaims that the best interests of the child shall be the paramount consideration in all actions concerning children, thereby domesticating international standards and constitutionalising what in South Africa had become an important common law principle. In *Sonderup v Tondelli*,¹⁹ the Constitutional Court correctly pointed out that section 28 of the Constitution responds in an

¹⁵ This is an alarming omission given that article 3 of the Children’s Charter of South Africa sought to protect child participation rights in almost all contexts.

¹⁶ The Constitution of the Republic of South Africa, 1996.

¹⁷ See J Sloth-Nielsen and BD Mezmur ‘2 + 2 = 5? Exploring the domestication of the CRC in South African jurisprudence (2002-2006)’ (2008) 16 *The International Journal of Children’s Rights* 1, 1-2 and T Boezaart ‘Child law, the child and South African private law’ in T Boezaart (ed) *Child law in South Africa* (2009) 1, 56.

¹⁸ Section 28 (1) of the Constitution provides that ‘every child has the right-

- (a) to a name and a nationality from birth;
- (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
- (c) to basic nutrition, shelter, basic health care services and social services;
- (d) to be protected from maltreatment, neglect, abuse or degradation;
- (e) to be protected from exploitative labour practices;
- (f) not to be required or permitted to perform work or provide services that -
 - (i) are inappropriate for a person of that child’s age; or
 - (ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development;
- (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be;
 - (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner and kept in conditions that take account of the child’s age;
- (h) to have a legal representative assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result;
- (i) not to be used directly in armed conflict, and to be protected in times of armed conflict’.

Section 28(2) provides for the application of the best interests principle in all matters concerning children, and Section 28(3) defines a child as a person under the age of 18 years.

¹⁹ 2001 (1) SA 1171 (CC).

‘expansive way’ to South Africa’s international obligations as a State Party to the CRC.²⁰ There is academic support for this view.²¹ Besides giving effect to section 28 of the Constitution, the Children’s Act also domesticates international standards enshrined in the CRC and the African Children’s Charter.²² It stipulates that ‘[t]he rights which a child has in terms of this Act supplement the rights which a child has in terms of the Bill of Rights.’²³ This is not surprising, given that signature and ratification of international treaties require states, including domestic courts, to refrain from taking steps ‘which would defeat the object and purpose of a treaty’.²⁴ Combined with this pressing duty is the presumption, contained in article 4 of the CRC,²⁵ that States Parties to international treaties have the duty to give effect to the provisions of such treaties. The significance of these developments for the enjoyment of children’s rights in South Africa is briefly explored below.

Legal and social developments leading to the formal recognition of children’s rights may be seen both as a reflection of and a response to a deeper sociological conception of the parent-child relationship. In the mid-1980s, Burman underlined the need ‘to study children as children, not simply as future adults’ and regretted the invisibility of children ‘in the pages of history books’.²⁶ To some extent, student movements of the 1970s were a response to the systematic and arbitrary exclusion of African children from the mainstream education system and a claim to citizenship

²⁰ Para 29. See also *S v M* 2008 (3) SA 232 (CC) (hereafter *S v M*) para 16, observing that the CRC has become a benchmark against which national policies and legislative instruments must be measured. For academic commentary on the effect of the CRC on law-making in South Africa, see J Sloth-Nielsen and B Van Heerden ‘Signposts on the road to equality: Towards the new millennium for parents, children and families in South Africa’ in J Eekelaar and T Nhlapo (eds) *The changing family* (1998) 353.

²¹ See J Sloth-Nielsen ‘Children’s rights in the South African Courts: An overview since ratification of the UN Convention on the Rights of the Child’ (2002) 10(2) *The International Journal of Children’s Rights* 137, 139, who points out that ‘major features of the Convention have been constitutionalised in section 28 of the South African Constitution. Since those children’s rights that have been so encapsulated in the Constitution are justiciable in the courts, it can be concluded that the [CRC] has acquired legal significance via the Constitution’.

²² The Children’s Act recognises the importance of the CRC and other international instruments on children’s rights.

²³ Section 8(1) of the Children’s Act.

²⁴ Article 18 of the Vienna Convention on the Law of Treaties 1155 U.N.T.S. 331, 8 I.L.M. 679, adopted 22 May 1969, entered into force Jan. 27, 1980, provides that ‘[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

- (a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
- (b) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed’.

²⁵ Article 4 of the CRC provides directly that ‘States Parties shall take all legal, administrative and other measures for the implementation of the rights recognised in the present Convention’.

²⁶ S Burman ‘The contexts of childhood in South Africa: An introduction’ in S Burman and P Reynolds (eds) *Growing up in a divided society: The contexts of childhood in South Africa* (1986) 1, 1-2.

by children studying on the margins of society. Student demonstrations during apartheid had indirect effects on popular attitudes about children, confirmed that children were active social actors (rather than reactors to stimuli) and may, in the long run, have contributed to the constitutional protection of children's rights – particularly the right to education. The Soweto uprisings challenged the myth that children were passive objects and placed them at the centre of the struggle against apartheid. Whilst the exact extent to which student demonstrations gradually led to the constitutionalisation of children's rights is unknown, the presence of children in the streets confirmed the central claims of sociological theory, namely that children are active social agents endowed with the capacity to participate in decisions affecting them.²⁷

At the domestic level, authorities have acknowledged the important influence, on current debates concerning children's place in society, of the new paradigm in childhood research, namely the sociology of childhood. Brey et al argue that 'the new paradigm is now the common starting point of social science research involving children in South Africa and internationally. Typically, it recognises both the historical and cultural variations in notions of ideal childhoods; moves away from studying children simply as members of families or communities undergoing processes of socialisation into adulthood; and focuses instead on their everyday experiences as social actors navigating through socio-economic, cultural and political environments'.²⁸ A central pillar of sociological theory,²⁹ the idea that children are active actors, rational decision-makers and shapers of the social world has now influenced the development of children's rights in South Africa. This observation is supported by the protection of children's rights in the Constitution and numerous pieces of post-apartheid legislation.

²⁷ See sections 6.1-6.3 of Chapter Two.

²⁸ R Brey, I Gooskens, L Kahn, S Moses and J Seeking *Growing up in the new South Africa: Childhood and adolescence in post-apartheid Cape Town* (2010) 38. See also D Donald, A Dawes and J Louw (eds) *Addressing childhood adversity* (2000) 4, asserting that 'the way [children] perceive their circumstances will influence the way they respond to their human and physical contexts' and World Bank, *World Development Report 2007* (2006) 53, where the global financial institution observes that affording children social agency, endorses treating children as 'decision-making agents' and emphasises its own efforts in listening to children through focus groups in the developing world.

²⁹ See sections 6.1-6.3 of Chapter Two.

3 CHILDREN AS BEARERS OF RIGHTS AT THE NATIONAL LEVEL

South African law discards the historical notion of parental ownership of children and recognises that children are human beings entitled to rights. Since the early 1990s, domestic law has registered dramatic changes from the language of parental rights to children's rights; not least as a result of the transformative influence of the CRC and the African Children's Charter.³⁰ This brings an important linkage between international and domestic law, especially in light of the constitutional imperative that courts 'must consider international law' when interpreting a provision in the Bill of Rights.³¹ In the context of interpreting the Children's Act and other relevant domestic statutory instruments, the constitutional command that courts prefer an interpretation that is 'consistent with international law' whenever such an interpretation would be reasonable is likely to play an important role in harmonising international and municipal child law.³² Besides, it is an object of the Children's Act 'to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic'.³³

More importantly, however, the domestic recognition of children's rights entitle children and others acting on their behalf to make rights-based claims based not on international laws, but on national laws which have largely domesticated international standards. The domestic focus on children's rights allows individuals and interest groups to launch child protection proceedings against parents or guardians who violate children's rights. This removes the burden of having to prove that the international standards upon which the child (or the child's representative) is making claims against parents and the state have been incorporated into the domestic legal

³⁰ See generally, J Sinclair 'From parents' rights to children's rights' in CJ Davel (ed) *Children's rights in a transitional society* (1999) 62, 71-73 and B Van Heerden and J Sloth-Nielsen 'Putting humpty dumpty together back again: Towards restructuring families and children's lives in South Africa' (1998) 115 *South African Law Journal* 156, 156, foretelling 'an impending revolution in child and family law'.

³¹ Section 39(1)(b) of the Constitution provides that '[w]hen interpreting the Bill of Rights, a court...must consider international law'.

³² Section 233 of the Constitution provides that '[w]hen interpreting legislation, every court must prefer any interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.

³³ Section 2(c) of the Children's Act.

system by implementing legislation.³⁴ The constitutional recognition of the separate status and personhood of the child shows that every child has unique interests that are different from those of parents and other persons. Thus, the domestic protection of rights symbolises the social recognition of children as legal subjects.³⁵ According to Sloth-Nielsen, '[c]onstitutional guarantees provide the vehicle for implementation of children's rights in practice in the future'.³⁶ While the status of childhood potentially prevents children from taking full advantage of constitutional guarantees, it enables others to initiate proceedings meant to promote the realisation of children's rights.

Named after children, the Children's Act also calls for a change of perspective in the way society has viewed children for ages. Both the Constitution and the Children's Act send a signal that children are human beings in their own right with individual minds, views, emotions and rights which are different from those of parents. As Sachs J once observed:

Every child has his or her dignity. If a child is to be constitutionally imagined as an individual with distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his parents, umbilically destined to sink or swim with them...Individually and collectively, all children have the right to express themselves as independent social beings, to have their laughter as well as sorrow, to play, imagine and explore in their bodies, minds and emotions, and above all to learn as they grow, how they should conduct themselves and make choices in the wide social and moral world of adulthood.³⁷

Clearly, the recognition of children as distinct rights holders should not be underestimated as it rejuvenates the idea that children are legal subjects entitled to relative autonomy from parental and state control. As explained by Boniface, the constitutional recognition of children's rights

³⁴ Section 231 of the Constitution provides as follows:

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation, but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

³⁵ See generally CJ Davel and RA Jordaan *Law of persons* (2005) 55-56, who express the view that 'we come from an era where parental rights were central. The era we are now entering is one in which children's rights gain prominence. [T]he most important [reason behind this change] is probably South Africa's ratification of the[CRC] and the inception of the Constitution'.

³⁶ Sloth-Nielsen (note 10 above) 25.

³⁷ *S v M* paras 18-19.

‘runs counter’ to the status of the child under South African private law, in terms of which the child had no or limited capacity to act; enables children to enforce their rights against parents and the state as the Bill of Rights operates both horizontally and vertically; and disaggregates the child’s autonomy from family rights and parental autonomy.³⁸ Rights transform the parent-child relationship in ways that recognise the separate identity and individuality of the child. As Skelton observes, the focus on the need to distinguish children’s rights from parental rights marks ‘a subtle, but significant shift in...child rights jurisprudence’.³⁹

4 THE PROTECTION OF GENERAL PRINCIPLES UNDER THE DOMESTIC LEGAL SYSTEM

Not all the rights recognised as general principles in international law are directly given the same legal status at the national level. Whilst the right to non-discrimination, the best interests of the child and child participation are recognised as general principles under the Children’s Act, the right to life, survival and development is not directly given this status, except that ‘[a]ll proceedings, actions or decisions in a matter concerning a child must recognise a child’s need [not right to] for development and to engage in activities appropriate to the child’s age’.⁴⁰ In terms of 6(1) of the Children’s Act, ‘[t]he general principles set out *in this section* guide the implementation of all legislation applicable to children, including this Act; and (b) all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general’. Section 6(2)(a) expands the scope of general principles by providing that ‘[a]ll proceedings, actions or decisions...must respect, protect, promote and fulfil the child’s rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the *principles* set out in this Act’. This provision acknowledges the importance of all general principles for the enjoyment of Children’s rights in South Africa; expands the scope of general principles to include all the rights enumerated in section 28 of the Constitution and fulfils the Children’s Act’s claim that it seeks ‘[t]o give effect to certain rights of children as contained in

³⁸ A Boniface ‘Revolutionary changes to the parent-child relationship in South Africa’ in J Sloth-Nielsen and Z Du Toit (eds) *Trials and tribulations, trends and triumphs: Developments in international, African and South African child and family law* (2008) 151, 154.

³⁹ A Skelton ‘Severing the umbilical cord: A subtle jurisprudential shift regarding children and their primary caregivers’ (2008) 1 *Constitutional Court Review* 351, 364.

⁴⁰ Section 6(2)(a) of the Children’s Act.

the Constitution'.⁴¹ This study limits the analysis to the scope of rights that are considered to be general principles in international law.

4.1 Equality and non-discrimination

Equality and non-discrimination do not have a long history in South Africa.⁴² During apartheid, many children were victims of systematic and institutionalised discrimination.⁴³ Under the new democratic order, the idea of equality is a norm of great significance and is one of the founding values of the South African Constitution.⁴⁴ To prevent inequalities between different categories of persons, the Constitution provides that '[e]veryone is equal before the law and has the right to

⁴¹ See the Long Title and the preamble of the Children's Act.

⁴² Inter-racial inequality is the legacy of apartheid policies which discriminated, based mainly on race, against the majority of people in South Africa. Decades of systematic and institutionalised discrimination against the majority of South Africans caused deep inequalities between children belonging to marginalised social classes, particularly blacks. See Statistics South Africa, *General Household Survey* (2003), placing the number of African people who had not acquired an education at all at 14 percent and that of white people at 0.3 percent. In *Brink v Kitshoff* NO 1996 (4) SA 197 (CC) para 40, the Constitutional Court explained the systematic discrimination that characterised apartheid in the following terms:

Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90 percent of the land mass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. *The deep scars of this appalling programme are still visible in our society.*

See also *In re: The School Education Bill of 1995 (Gauteng)* 1996 (4) BCLR 536 (CC), holding as follows:

Immense inequality continues to exist in relation to access to education in our country. At present, the imperatives of equalising access to education are strong, and even though these should not go to the extent of overriding constitutionally protected rights in relation to language and culture, they do represent an important element in the equation. The theme of reducing the discrepancies in the life chances of all South Africans runs right through the Constitution, from the forceful opening words of the preamble to the reminder of the past.

See also IP Maithufi 'Children, young persons and school law' in JA Robinson (ed) *The law of children and young persons in South Africa* (1997) 235, 238.

⁴³ Today, there has been a surge in intra-racial inequality and children from poor families have continued to bear the yoke of social exclusion and marginalisation. See J Seekings and N Nattrass *Class, Race and Inequality in South Africa* (2005) 340 and S Terreblanche *History of inequality 1652-2002* (2002) 132, arguing that neo-liberalism has created a 'black elite' at the expense of the masses, who continue to abject live in poverty.

⁴⁴ See section 1 of the Constitution. Other constitutional provisions placing equality at the centre of legislative and administrative measures, and judicial decision-making include sections 9, 25, 36, and 39 of the Constitution. The right to equality and non-discrimination are also protected by section 6(2)(d) of the Children's Act and the whole of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Both pieces of legislation apply vertically and horizontally, thereby binding states and families to refrain from unfairly discriminating against certain classes of children.

equal protection and benefit of the law'.⁴⁵ For unequal treatment between categories of persons to be justified or ethically appropriate, there must be a rational purpose behind the discrimination. Accordingly, law or conduct violates the equal protection clause if the differentiation it makes serves no legitimate purpose and if there is no rational connection between the differentiation and the purpose for which it is designed.⁴⁶

However, equal protection does not mean a form of identical treatment, in the arithmetical sense, that absolutely negates the importance of differentiating between certain categories of people.⁴⁷ Classificatory distinctions 'founded on a reasonable basis and...relevant to the purpose [they are] designed to serve' fall within the meaning of equal treatment.⁴⁸ The law, for instance, makes age-based distinctions in such areas as marriage, legal status, liability for civil or criminal offences and many more. These classifications lie within the equal protection clause provided the stipulated ages are not arbitrary, but are based on current knowledge about human development.⁴⁹ In *Christian Lawyers Association of South Africa v Minister of Health*,⁵⁰ the Court held that age-based discrimination offends the right to equality and that the party perpetrating it bears the burden to prove that the discrimination is fair.⁵¹ The judge held that the distinction between women who possess or lack the capacity to give informed consent to an abortion was rational and therefore constitutional.

⁴⁵ Section 9(1) of the Constitution.

⁴⁶ See *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 25, holding as follows:

In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of a constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner....Accordingly before it can be said that mere differentiation infringes section 8(1) [of the Interim Constitution], it must be established that there is no rational relationship between the differentiation in question and the government purpose which is proffered to validate it. In the absence of such a rational relationship the differentiation would infringe section 8 [of the Interim Constitution].

⁴⁷ See *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) para 32, holding that remedial measures should not be viewed as an exception to the right to equality, but as a substantive and composite part thereof; and *National Coalition* case, paras 60-61.

⁴⁸ JD Van der Vyver 'Constitutional of children and young persons' in Robinson (note 42 above) 265, 291.

⁴⁹ The need for certainty should be balanced with the reality that there are differences in the ages at which different children acquire intellectual competences. For a detailed discussion on variations on the ages at which children acquire competences, see A Moyo 'Youth, competence and punishment: Reflections on South Africa's minimum sentencing regime for juvenile offenders' (2011) 26(1) *Southern African Public Law* 229, 231-35.

⁵⁰ 2005 (1) SA 509 (T).

⁵¹ Para 55.

Apart from the equal protection and benefit of the law clause, the Constitution and the Children's Act prohibit discrimination based on many of the grounds mentioned in international law.⁵² Discrimination based on any of the stated grounds, including sex and age, is presumed to be unfair unless it can be proven to be fair.⁵³ As stated in Chapter Three, gender disparities remain a serious challenge to aspirational visions of non-discrimination, even in the context of participation rights.⁵⁴ Against this background, the constitutional prohibition of discrimination against children based on sex and age goes a long way in ensuring every child's equal enjoyment of rights.⁵⁵ Further, the South African equality scheme expressly constitutionalises the idea of substantive equality.⁵⁶ Substantive equality requires law or conduct to promote 'equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal'.⁵⁷ This means that

⁵² Section 9(3) of the Constitution provides that '[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth' and section 2(d) of the Children's Act provides that '[a]ll proceedings, actions or decisions in a matter concerning a child must protect the child from unfair discrimination on *any ground*, including on the grounds of the health status or disability of the child or a family member of the child'.

⁵³ See section 9(3) and (5) of the Constitution.

⁵⁴ Section 4.1 of Chapter Three.

⁵⁵ See, however, *Volks NO v Robinson* 2005 (5) BCLR 466 (CC) para 163, where Sachs J held that '[f]or all the subtle masks that racism may don, it can usually be exposed more easily than sexism and patriarchy, which are so ancient, all-pervasive and incorporated into the practices of daily life as to appear socially and culturally normal and legally invisible'. See also S Firestone *The dialectic of sex* (1970) 1-14, arguing that no society can claim innocence to the charge of marginalising girls because boys and girls are, from birth, not equally privileged; and K O'Donovan *Family law matters* (1993) 60-89, arguing that social institutions and the law have gendered and masculine faces.

⁵⁶ Section 9(2) of the Constitution provides that '[e]quality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken'. Section 9(2) of the Constitution binds the state to promote the rights of children with disabilities; girls and other categories of children historically discriminated against on the basis of stipulated or analogous grounds.

⁵⁷ I Currie and De Waal *The Bill of Rights Handbook* 6 ed (2013) 213. See also *Motala v University of Natal* 1995 (3) BCLR 374 (D) 383; *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 41; *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) para 118; *Bato Star Fishing v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) para 74; *MEC for Education: KwaZulu-Natal, Thulani Cele: Social Liaison Officer, Ann Martin: Principal of Durban Girls High School, Fiona Knight: Chairperson of the Governing Body of the Durban Girls High School v Navaneethum Pillay, Governing Body Foundation, Natal Tamil Vedic Society Trust, Freedom of Expression Institute* 2008 (1) SA 474 (CC) para 103. For academic authorities, see C Albertyn and B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14(2) *South African Journal on Human Rights* 248; P De Vos 'Equality for All? A Critical analysis of the equality jurisprudence of the Constitutional Court' (2000) 63 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 62; S Fredman 'Providing equality: Substantive equality and the positive duty to provide' (2005) 21 *South African Journal on Human Rights* 163-90; H Botha 'Equality, plurality and structural power' (2009) 25 *South African Journal on Human Rights* 1; A Moyo 'Defending human rights and the rule of law by the SADC Tribunal: Campbell and beyond' (2009) 9(2) *African Human Rights Law Journal* 590, 602-07; and P De Vos 'The past is unpredictable: race, redress and remembrance in the South African Constitution' (2012) *South African Law Journal* 73.

the state is required to take positive measures to promote the rights of children who have been victims of institutionalised discrimination in the past.⁵⁸

4.2 The best interests of the child

The domestic recognition of the best interests of the child as the ‘paramount consideration’ in all matters concerning the child pre-dates the adoption of binding international child rights instruments.⁵⁹ In *Fletcher v Fletcher*,⁶⁰ the then Appeal Court elevated the best interests of the child to a ‘paramount consideration’ in custody proceedings affecting children. Later cases have followed this case.⁶¹ Nonetheless, it was the dawn of the new constitutional dispensation that marked a more direct and peremptory recognition of the best interests of the child.⁶² Section

⁵⁸ See, for example, T Loenen ‘The equality clause in the South African Constitution: Some remarks from a comparative perspective’ (1997) 13(3) *South African Journal on Human Rights* 401, 405.

⁵⁹ See *Simey v Simey* (1880-1882) 1 (SC) 171, 176, where it was held that in analysing the facts of the case, the Court must ‘chiefly be guided by the consideration of the best interests of the children’; *Cronje v Cronje* 1907 TS 871 at 872, where the Court held that [i]n all cases the main consideration for the court in making an order with regard to the custody of the children is, what is the best interest of the children themselves’; *Tabb v Tabb* 1909 TS 1033 at 1034, where Innes CJ held that ‘the guiding principle to be borne in mind is not what the feelings of the parents are, but what is best for the children’; *Rodgers v Rodgers* 1930 TPD 469 at 470; where the Court held that it was important ‘to consider the whole question from the point of view of the children’s best interests’; *Cook v Cook* 1937 AD 154 at 163, re-asserting the principle that [i]n all cases the main consideration for the court in making an order with regard to the custody of the children is, what is the best interest of the children themselves’; *Milsten v Milstein* 1943 TPD 227 at 228, where Greenberg JP held that the standard position regarding custody has always been that ‘if the interests of the child or children will clearly be served better by its [sic] being in the custody of one spouse, then custody will be given to that spouse even though the other spouse is both the father and the innocent party’;

⁶⁰ 1948 (1) SA 130 (A) at 134. In this case, Centlivres JA, in a custody determination, refused to contrast the rights of the innocent and the guilty party as this approach portrayed the child ‘as if [he or she] were a mere chattel’. The court later stressed the importance of the best interests of the child in custody determinations.

⁶¹ See *Kaiser v Chambers* (1969) 4 SA 224 (C) at 228G, where the Court referred to the best interests of the child as a ‘golden thread which runs through the whole fabric of our law relating to children’. See also *Bethell v Bland* 1996 (2) SA 194 (W); *Krasin v Ogle* [1997] 1 All SA 557 (W); *Madiehe (born Ratilhogo) v Madiehe* 1997 (2) All SA 153 (B); *Van Pletzen v Van Pletzen* 1998 (SA) 95 (O); *Meyer v Gerber* 1999 (3) SA 650 (O); *Kirsh v Kirsh* [1999] 2 All SA 193 (C); *K v K* 1999 (4) SA 691 (C); *Lubbe v Du Plessis* 2001 (4) SA 57 (C); *Van Rooyen v Van Rooyen* [2001] 2 All SA 37 (T) and *McCall v McCall* 1994 (3) SA 201 (C).

⁶² On the legislative front, Parliament started by reluctantly referring to the interests (not the best interests) of the child or the best that could be achieved in the circumstances. See, for example, section 5(1) of the Matrimonial Act 37 of 1953 empowering courts to grant sole guardianship or custody to a parent if it is in the interest of the child; and section 6(1)(a) of the Divorce Act 70 of 1979, barring courts from granting a divorce decree unless the arrangements that have been made concerning the welfare of the child ‘are the best that can be effected in the circumstances’. Academic literature suggests that the introduction of the Family Advocate in the Mediation Act was intended to protect the best interest of the child. See B Clark “‘A golden thread?’ Some aspects of the application of the standard of the best interests of the child in South African law” (2000) *Stellenbosch Law Review* 3, 6; B Bekink and M Bekink ‘Defining the standard of the best interest of the child: Modern South African perspectives’ (2004) 37 *De Jure* 21, 23 and N Glasser ‘Custody on divorce: Assessing the role of the family advocates’ in S Burman (ed) *The fate of the child: Legal decisions on children in the new South Africa* (2003) 108-21.

28(2) of the Constitution provides that '[a] child's best interests are of *paramount importance* in every matter concerning the child'. Section 9 of the Children's Act is more emphatic and specific, providing that 'in all matters concerning the care, protection and well-being of the child, the standard that the child's best interest is of *paramount importance*, must be applied'. The Children's Act accords the status of general principle to the best interests of the child, refers to the principle in more than 40 provisions⁶³ and makes it the leading consideration in almost all of these provisions. The best interests of the child are not just a constitutional right, but also a principle to be applied in interpreting and defining the scope and limitations of other rights.⁶⁴ In *Teddy Bear Clinic for Abused Children and Another v Minister of Constitutional Development and Another*,⁶⁵ the Constitutional Court held that '[s]ection 28(2) fulfils at least two separate roles. The first is as a guiding principle in each case that deals with a particular child. The second is as a standard against which to test provisions or conduct which affect children in general'.⁶⁶ Thus the principle plays an important role in determining the appropriateness of decisions made by children, parents or the state.⁶⁷

In South African law, the best interest of the child is of 'paramount importance'. Literally, the word 'paramount' means 'supreme' or 'overriding' and suggests that no other factor – regardless of context – is more important than the best interests of the child. However, domestic courts have long held that determining what is best requires the consideration of many factors.⁶⁸ The

⁶³ See sections 1; 2(a)(iv); 6(2)(a) and (3); 7; 9; 13(1)(d); 22(5); 23(2)(a) and (3)(a); 24(2)(a); 28(4)(a); 29(3); 33(3); 55(1); 60(2); 61(1)(c); (2) and (3)(a); 64(1)(a); 66(b); 72(2); 116(2); 127(2); 130(1)(a); 133(2)(e)(i); 144(1)(b); 151(8); 152(4); 153(1) and (6)(b); 156(1)(g)(ii); 157(3); 230(1)(a); 234(4); 235(4)(b); 239(1)(b)(ii); 240(2)(a); 241(1)(b); 243(3)(a); 248(1)(e); 261(5)(a) and (6)(a); 262(5)(a) and (6)(a); 270(1); 286(2)(a) and 290(2)(a) of the Children's Act.

⁶⁴ See *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) para 17-18 and *Du Toit v Minister of Welfare and Population Development* (Lesbian and Gay Equality Project as *amicus curiae*) 2003 (2) SA 198 (CC) (hereafter *Du Toit v Minister of Welfare and Population Development*) para 2.

⁶⁵ 2014 (2) SA 168 (CC).

⁶⁶ Para 69. See also *C and Others v Department of Health and Social Development, Gauteng, and Others* 2012 (2) SA 208 (CC) and *S v M* paras 24-26.

⁶⁷ Compare with section 4.2 of Chapter Three.

⁶⁸ In *McCall v McCall*, at 204J-205G, King J identified these factors as:

- (a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
- (b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
- (c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings;

paramountcy of the best interests principle does not imply that other interests and rights (such as those of parents) are less important.⁶⁹ The Constitutional Court has held that the principle is not an ‘overbearing and unrealistic trump of other rights’ and that it is ‘capable of limitation’. Consequently, [t]he fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights...their operation has to take into account their relationship to other rights, which might require that their ambit be limited’.⁷⁰ Therefore, it is imperative for decision-

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- (d) the capacity and disposition of the parent to give the child the guidance which he requires;
 - (e) the ability of the parent to provide for the basic physical needs of the child, the so-called ‘creature comforts’, such as food, clothing, housing and the other material needs – generally speaking, the provision of economic security; the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
 - (f) the ability of the parent to provide for the child’s emotional, psychological, cultural and environmental development;
 - (g) the mental and physical health and moral fitness of the parent;
 - (h) the stability or otherwise of the child’s existing environment, having regard to the desirability of maintaining the status quo;
 - (i) the desirability or otherwise of keeping siblings together;
 - (j) the child’s preference, if the Court is satisfied that in the particular circumstances the child’s preference should be taken into consideration;
 - (k) the desirability or otherwise of applying the doctrine of same sex matching, particularly here, whether the minor children should be placed in the custody of their father; and
 - (l) any other factor which is relevant to the particular case with which the court is concerned.

Whilst domestic courts are not bound to follow this list, they have from time to time referred to it when making decisions, particularly custody determinations. See, for example, *V v V* 1998 (4) SA 169 (C) at 187E-F and *Ex parte Critchfield* 1999 (3) SA 132 W at 145C. The former case insisted that the *McCall* catalogue of factors is merely a guide, not a prescriptive list.

⁶⁹ See generally M Minow *Making all the difference: Inclusion, exclusion and American law* (1990) 277; PC Davis ‘Contested images of family values: The role of the state’ (1994) 107 *Harvard Law Review* 1348, 1371; P Alston ‘The best interests principle: Towards a reconciliation of culture and human rights’ in P Alston (ed) *The best interests of the child: Reconciling culture and human rights* (1994) 1-25; A An-Na’im ‘Cultural transformation and normative consensus on the best interests of the child’ in P Alston (ed) *The best interests of the child: Reconciling culture and human rights* (1994) 62-81; J Herring ‘The Human Rights Act and the welfare principle in family law – Conflicting or complementary?’ (1999) 11 *Child and Family Law Quarterly* 223, 225 and J Herring ‘Welfare principle and the rights of parents’ in A Bainham, SD Sclater and M Richards (eds) *What is a parent? A socio-legal analysis* (1999) 89, 101, calling for a version of the best interest principle that balances the interests of children, parents and others. For the view that the interests of others (including other children) may limit the scope of the best interest of the child; particularly in communitarian societies, see R Cohen ‘Endless teardrops: Prolegomena to the study of human rights in Africa’ in R Cohen, G Hyden and WP Nagan (eds) *Human rights and governance in Africa* (1993) *Human rights and governance in Africa* (1993) 1, 14; A An-Na’im ‘Cultural transformation and normative consensus on the best interests of the child’ in P Alston (ed) *The best interests of the child: Reconciling culture and human rights* (1994) 62-81; A Armstrong *A child belongs to everyone: Law, family and the construction of the best interests in Zimbabwe* (Innocenti Occasional Papers, Child Rights Series 11, 1995) 5-7; J Waldron ‘The role of rights in practical reasoning: “Rights” versus “needs”’ (2000) 4 *The Journal of Ethics* 115 124 and 132; C Himonga ‘Implementing the rights of the child in African legal systems: The Mthembu journey in search of justice’ (2001) 9 *The International Journal of Children’s Rights* 89, 109; and A Twum-Danso ‘Reciprocity, respect and responsibility: The 3Rs underlying parent child-child relationships in Ghana and the implications for children’s rights’ (2009) 17(3) *International Journal of Children’s Rights* 415.

⁷⁰ *S v M* para 26. In the same case, the Court, at para 42, held that ‘[t]he paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not

makers to take into account other competing interests and views, especially those of parents and other members of the family.⁷¹ Besides, the best interests of the child is a constitutional right and, like other rights in the Bill of Rights, it is subject to limitations that fulfil the requirements of section 36 of the Constitution.⁷²

More importantly, the Children's Act goes beyond international law in that it provides a catalogue of factors to be considered in determining the best interest of the child.⁷³ These factors

necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned'. At para 112, Madala J, in his dissenting judgment in the same case, held that [r]endering the child's best interests paramount does not necessitate that other competing constitutional rights may be simply ignored or that a limitation of the child's best interest is impermissible'. Against this background, Pillay J's remark in *Kleynhans v Kleynhans* (2009) JOL 24013 (ECP) 24018, that the best interest 'surges above all else' in an application or related procedure is clearly incorrect.

⁷¹ See, for example, *C and Others v Department of Health and Social Development, Gauteng & Others* 2012 (2) SA 208 (CC) (hereafter *C v Department of Health and Social Development*) para 27, holding that a determination of what is 'best' for the child requires 'as a minimum, [that] the *family*, and particularly the child concerned ... be given an opportunity to make representations on whether removal is in the child's best interests'.

⁷² See A Skelton 'Constitutional protection of children's rights' in Boezaart (note 17 above) 265, 280-82.

⁷³ In terms of section 7 of the Children's Act, these factors include:

- (a) 'the nature of the personal relationship between—
 - (i) the child and the parent(s) and
 - (ii) the child and any other...person relevant in [the] circumstances;
- (b) the attitude of the parent(s) towards—
 - (i) the child; and
 - (ii) the exercise of parental responsibilities and rights in respect of the child;
- (c) the capacity of the parent(s) or...any person to provide for the needs of the child, including emotional and intellectual needs;
- (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from—
 - (i) both or either of the parents; or
 - (ii) any [sibling] or other child, or any...person with whom the child has been living;
- (e) the practical difficulty and expense of a child having contact with the parent(s) and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parent(s)...on a regular basis;
- (f) the need for the child—
 - (i) to remain in the care of [the] parent[s], family and extended family; and
 - (ii) to maintain a connection with his or her family, extended family, culture or tradition;
- (g) the child's—
 - (i) age, maturity and stage of development;
 - (ii) gender;
 - (iii) background; and
 - (iv) any other relevant characteristics of the child;
- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
- (i) any disability that a child may have;
- (j) any chronic illness from which a child may suffer;

provide guidance to decision-makers, including parents and the state, on how to determine the content and scope of the best interests of the child. Given that there have been compelling charges of indeterminacy against the best interests of the child,⁷⁴ the list brings some degree of certainty on what exactly is to be considered when making decisions that are consistent with the principle. Apart from narrowing down the problem of indeterminacy, this approach broadens the enquiry to other factors not even envisaged in international law.⁷⁵

The views of the child are not part of the list and this, perhaps, signals that a protective conception of the best interests of the child was intended. That the views of the child do not make the list raises concerns if one considers that the list is closed.⁷⁶ This is an unwelcome departure from case law⁷⁷ and academic writing on the best interests of the child.⁷⁸ Under the

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- (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
 - (l) the need to protect the child from any physical or psychological harm that may be caused by
 - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
 - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
 - (m) any family violence involving the child or a family member of the child; and
 - (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child’.

⁷⁴ On indeterminacy and other shortcomings of the best interest principle, see RH Mnookin ‘Child-custody adjudication: Judicial functions in the face of indeterminacy’ (1975) 39 *Law and Contemporary Problems* 226-93; J Goldstein, A Freud and A Solnit *Beyond the best interests of the child* (1980); R Mnookin *In the best interests of children* (1985) 257; M Fineman ‘Dominant discourse, professional language and legal change in child custody decision-making’ (1988) 101(4) *Harvard Law Review* 727-74; J Elster *Solomonic judgments: Studies in the limitations of rationality* (1989); S Parker ‘The best interests of the child – Principles and problems’ (1994) 8(1) *International Journal of Law and the family* 26 and MS Melli ‘Towards a restructuring of custody decision-making at divorce: An alternative approach to the best interest of the child’ in J Eekelaar and P Sarcevic (eds) *Parenthood in modern society: Legal and social issues for the Twenty-first Century* (1993) 325-37.

⁷⁵ The statutory list of factors to be considered in determining the best interests of the child includes, among many others, the ‘attitude of the parents towards the child; and towards [others]’ exercise of parental responsibility in respect of the child’. See section 7(1)(b) of the Children’s Act.

⁷⁶ In *McCall v McCall*, at 205F-G, the court ultimately refers to ‘any other factor which is relevant to the particular case with which the court is concerned’ to underline the open-endedness of factors that may possibly be considered to be relevant. At 207H-J, the Court followed this observation by holding that ‘with reference to the child’s preference, if the court is satisfied that the child has the necessary intellectual and emotional maturity to give in his or her expression of a preference a genuine and accurate reflection of his feeling towards and relationship with each of his parents, in other words, to make an informed and intelligent judgment, *weight should be given to his or her expressed preference*’.

⁷⁷ There is a string of cases in which the child’s views were at list considered, but could not be given due weight because the children in question were either immature or had been unduly influenced by a parent or caregiver. See *Germani v Herf* 1975 (4) SA 887 (A); *Stock v Stock* 1981 (3) SA 1280 (A); *Evans v Evans* 1982 (1) SA 371; *Matthews v Matthews* 1983 (4) SA 136 (SE); *Greenshields v Wyllie* 1989 (4) SA 898 (W); *Hlope v Mahlalela* 1998 (1) SA 449 (T); and *Van Rooyen v Van Rooyen* 1999 (4) SA 435. In *McCall v McCall*, at 205, the Court referred to

Children's Act, the list of factors simply refers to the age, maturity and stage of development of the child, but this is in no way linked to the child's views. However, the child's right to participate under section 10 is one of the general principles governing the implementation of all legislation applicable to children, including the Children's Act,⁷⁹ and therefore the views of the child would always be, by necessary implication, part of the criteria for determining what is best for the child.

The best interest principle determines which choices, between those made by children, parents or the state, are to be preferred over the others. It plays a mediatory role in guiding the state or local courts to decide whether to give decisive weight to the parent's or the child's view, or whether to adopt an entirely different approach. As stated in Chapter Three, the principle justifies a particular approach to matters related to the child's rights, including participation rights, and assists in solving conflicts between parents, children and the state.⁸⁰ Both the Constitution and the Children's Act are consistent with international law in permitting parents and the state to override the child's views if they are not in the child's best interests.⁸¹ Nonetheless, the best interests of the child includes autonomy interests and parents or the state may not disregard

'the child's preference' as one of the factors to be considered 'if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration'.

⁷⁸ On the centrality of the child's views to determining the child's interests, see J Eekelaar 'The best interests of the child and the child's wishes: The role of dynamic self-determinism' in Alston (note 69 above) 42; and N Thomas and C O'Kane 'When children's wishes and feelings clash with their best interests' (1998) 6 *International Journal of Children's Rights* 137.

⁷⁹ Section 6(a) of the Children's Act provides that the general principles set out in this section guide

- (a) the implementation of all legislation applicable to children, including this Act; and
- (b) all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general.

⁸⁰ See section 4.2 of Chapter Three. For children, 'well-being trumps liberty' in the event of a conflict between the two, but adults generally have the autonomy to make independent decisions regardless of whether such decisions are bad or good. See generally W Galston 'When well-being trumps liberty: Political theory, jurisprudence and children's rights' (2004) 79(1) *Chicago-Kent Law Review* 279; D Archard 'Free speech and the interests of children' (2004) 79(1) *Chicago-Kent Law Review* 83; A Etzioni 'On protecting children from speech' (2004) 79(1) *Chicago-Kent Law Review* 3; and A Etzioni 'Response' (2004) 79(1) *Chicago-Kent Law Review* 299.

⁸¹ See section 4.2 of Chapter Three revealed that in the context of child participation rights and parental responsibility, the paternalistic management of children is justified to the extent that it reflects the incapacity of the child to decide what is in his or her best interests. Such incapacity is evident when a child, by exercising autonomy in the decision-making process, would become less likely to achieve the goals (such as optimal development and self-preservation) for which autonomy rights are valued.. See also F Scarre 'Children and paternalism' (1990) 55 *Philosophy* 117, 123 and L Hagger *The child as vulnerable patient: Protection and empowerment* (2009) 5-6, who generally argues that the best interests principle authorises parents and the state to intervene with the child's decision when there is reason to believe that the child's views are not based on rational considerations, and that they are likely to result in a reduction of the child's stock of the good.

children's growing maturity in giving meaning to the best interests of the child.⁸² Besides, the interests of the child include not only an incompetent child's need for protection, but also competent adolescents' relative emancipation from parents and the state.⁸³

4.3 Life, survival and development

The right to life, survival and development does not have a long history in South Africa, certainly not for children belonging to historically marginalised groups. Today, the Constitution provides that 'everyone has the right to life'.⁸⁴ The terms 'survival' and 'development' have no direct equivalents under domestic law,⁸⁵ except that children have a right 'not to be required or permitted to perform work or provide services that place at risk the child's well-being, education, physical or mental health or *spiritual, moral and social development*'.⁸⁶ The Children's Act also provides that '[a]ll proceedings, actions or decisions in a matter concerning a child must recognise a child's need for development and to engage in...activities appropriate to the child's age'.⁸⁷ A holistic reading of the Bill of Rights suggests that the right to life imposes positive and negative duties on children, parents and the state. In terms of section 7(2) of the Constitution, '[t]he state must respect, protect, promote and fulfil' the child's right to life. As argued by Pieterse, 'at its core, the right to life protects human life from extinction. To kill or to condone the killing of a person thus amounts to an infringement of the right to life'.⁸⁸ Read with section 7(2) of the Constitution, the right to life imposes on the state the duty to protect everyone from

⁸² See sections 10 and 31 of the Children's Act. See also A Anderson and A Spijker 'Considering the view of the child when determining her best interest' (1999) 20(1) *Obiter* 364, 365 and A Anderson and A Spijker 'Considering the view of the child when determining her best interest' (2002) *Obiter* 365.

⁸³ See sections 5.2 and 5.3 of Chapter Two and 5.3 and 6.3 of Chapter Three.

⁸⁴ Section 11 of the Constitution.

⁸⁵ While the Constitution does not directly protect 'survival and development' as part of the right to life, it protects a cluster of survival or provision rights which, if promoted and fulfilled, will guarantee the survival and optimal development of children. See P Mahery 'The United Nations Convention on the Rights of the Child: Maintaining its value in international and South African child law' in Boezaart (note 17 above) 309, 320.

⁸⁶ Section 28(1)(f)(ii) of the Constitution.

⁸⁷ Section 6(2)(e) of the Children's Act. See also section 2(d), providing that the Children's Act makes 'provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children' and section 2(i) stating 'the protection, development and well-being of children' are some of the goals of the Children's Act.

⁸⁸ M Pieterse 'Life' in S Woolman, M Bishop and J Brickhill (eds) *Constitutional law of South Africa* Vol 3 (2005) 39-1, 39-38.

unlawful threats to their life and bodily integrity.⁸⁹ The right to life binds the state to adopt measures to prevent the arbitrary deprivation of life and to protect children from preventable diseases,⁹⁰ life-threatening forms of punishment and harmful social, cultural and economic practices.⁹¹ The positive duty to fulfil the right to life is strengthened by the constitutional protection of socio-economic rights.⁹²

Human life has intrinsic value. The importance of the right to life is underlined by the fact that it is one of only two rights, alongside the right to dignity, from which derogation is ‘entirely’ prohibited during states of emergency.⁹³ In *S v Makwanyane*,⁹⁴ the Constitutional Court abolished the death penalty, holding that it was an inhuman, degrading and cruel form of punishment and an unjustifiable limitation of the right to life.⁹⁵ The protection of life remains an

⁸⁹ *S v Makwanyane* para 193; *Carmichelle v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 44; *Minister of Safety and Security v Carmichelle* 2004 (3) SA 305 (SCA) para 33, where the Court held that state functionaries have the duty to protect the lives of citizens where they know or should have reasonably known of ‘a real and immediate risk to life’ and should take action as might be reasonably ‘expected to avoid that risk’; and *Osman v United Kingdom* 29 EHRR 245 (ECHR) para 115, where the European Court of Human Rights held that the right to life ‘may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual’. See also PG Ramcharan ‘The concepts and dimensions of the right to life’ in BG Ramcharan (ed) *The right to life in international law* (1985) 1, 7.

⁹⁰ Demographic and national health data suggest that South Africa is in keeping with its constitutional promise to protect, promote and fulfil the child’s right to life. Over the last decade, infant and child mortality rates have steadily decreased, thereby showing the country’s commitment to the improvement of children’s lives, health and development. According to UNICEF, South Africa’s infant mortality rate (IMR) stood at 33 deaths per 1,000 live births (down from 47 deaths per 1000 live births in 1990) while the under-five mortality (U5MR) stood at 45 per 1,000 live births (again down from 61 deaths per 1000 live births in 1990). See UNICEF *The state of the world’s children in numbers: Every child counts: Revealing disparities, advancing children’s rights* (2014) 34. See, however, K Abrahams and T Matthews *Promoting children’s rights in South Africa: A handbook for members of Parliament* (Cape Town: Parliament of the Republic of South Africa, 2011) 48.

⁹¹ See generally *Roach & Pinkerton v. United States*, Case 9.647, Inter-Am. C.H.R., Report No. 3/87, OEA/Ser.L/V/II.71, doc. 9 rev.1 ¶ 56 (1987) at 63, holding that ‘[t]he failure of the federal government to pre-empt the states as regards this most fundamental right – the right to life – results in a pattern of legislative arbitrariness which results in the arbitrary deprivation of life and inequality before the law’ and *Roper v. Simmons*, 543 U.S. 551 (2005), holding it unconstitutional for states to sentence a person to death for crimes committed when they were under 18 years of age.

⁹² These include, among others, the rights to basic nutrition, shelter, basic health care services and social security; access to adequate housing; sufficient food and water; social security and social assistance; and the right to education as contained in sections 26, 27, 28(1)(c) and 29 of the Constitution. There is academic support for the view that these rights import into South Africa the concepts of survival and development as protected in the CRC. See M Dutschke and K Abrahams *Children’s right to maximum survival and development* (Children’s Institute, University of Cape Town, 2006) 4, stating that ‘[t]he right of the child to maximum survival and development is therefore incorporated into the Constitution through the duty to respect, protect, promote and fulfil the right to life via the children’s rights clause and by way of the socio-economic rights applicable to everyone’.

⁹³ Sections 11 and 37 of the Constitution read together.

⁹⁴ 1995 (3) SA 391 (CC).

⁹⁵ Paras 95; 166; 174; 176; 179; 199; 234; 314; 317 and 344.

important goal and duty on the part of the state and its citizens.⁹⁶ The prohibition on intentional killing and assisted suicide are central pillars of the duty to protect human life.⁹⁷ Thus, the state has interests in (a) protecting the integrity of the medical profession, (b) protecting vulnerable persons, such as terminally ill child patients, from being unduly influenced or pressured into making involuntary end-of-life decisions⁹⁸ and (c) preventing a slide down the path to mercy killing.⁹⁹ This has implications for the autonomy of children and parents in making medical or other decisions that threaten the lives of children.

Respect for human life has become one of the central values of the new constitutional dispensation and an important interest to be protected by the state when decisions are made. According to the Constitutional Court, the non-derogable right to life calls for greater levels of protection than is comparatively demanded by constitutions of other jurisdictions.¹⁰⁰ Against the background of colonial and apartheid abuses of human life, the state's interest in protecting life in itself is very compelling. The vulnerabilities that accompany childhood and the fact that children are part of society's future further entrench the sanctity of life and the state's duty to protect life or prevent the arbitrary deprivation thereof. Whether made by parents, children or the state, decisions that threaten the child's right to life will generally not be considered to be in the best interests of the child. Thus, while it is not protected as a general principle at the domestic

⁹⁶ See sections 4.3 of Chapter Three.

⁹⁷ See *Ex parte Die Minister van Justisie: In Re S v Grotjohn* 1970 (2) SA 355 (A) where the Court, on review, held that depending on the circumstances of each case, a person who aids another to commit suicide is guilty of murder, manslaughter, attempted murder or no crime at all; and *S v Hartman* 1975 (3) SA 532 (C) where the Court convicted a person of the murder of his terminally ill father for injecting the latter, in an attempt to end his suffering, with drugs which immediately ended his life. For comparative jurisprudence, see *Washington v Glucksberg* 521 US 702 (1997) 717 at 731, where the US Supreme Court held that 'physician-assisted suicide could...undermine the trust that is essential to the doctor-patient relationship by blurring the time-honored line between healing and harming' and *Sampson and Doe v State of Alaska* 31 P 3d 88 95 (Alaska 2001), where the Court rejected the 'contention that physician-assisted suicide is a fundamental right within the core meaning of the Alaska Constitution's privacy clause'.

⁹⁸ In *Washington v Glucksberg* at 731-732, the Court held that '[w]e have recognised ... the real risk of subtle coercion and undue influence in end-of-life situations...[I]f physician-assisted suicide were permitted, many might resort to it to spare their families the substantial financial burden of end-of-life health-care costs...[T]he State's assisted-suicide ban reflects and reinforces its policy that the lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy'.

⁹⁹ See *S v Smorenburg* 1992 CPD (unreported), declaring that assisted suicide is unlawful regardless of the assistant's motive to end the suffering of the patient. In *Washington v Glucksberg* at 732-733, the Court held that 'what is couched as a limited right to 'physician-assisted suicide' is likely, in effect, a much broader license, which could prove extremely difficult to police and contain'.

¹⁰⁰ *S v Makwanyane* paras 38-40 and 85.

level, the right to life plays an important role in determining the best interests of the child, particularly in the context of medical decisions.

4.4 Child participation

Child participation rights are protected at the domestic level in almost the same way they are recognised in international law. The Children's Act enshrines participation as a general principle. Section 10 of the Children's Act provides that '[e]very child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration'.¹⁰¹ The scope and content of section 10 is explained in some detail below.¹⁰² For now, it is important to emphasise that the codification of child participation rights represents the recognition of the child's separate personhood and signifies a concrete move away from the property theory of rights.¹⁰³ Thus, children should be seen not as instruments for the achievement of the ends of others, but as ends in themselves with rights to protection, citizenship and autonomy.

Participation rights underscore the importance of recognising children as separate bearers of rights and respecting their developing capacities in the decision-making process. As a general principle, participation requires parents and the state to recognise that as children grow in age and capacity, their claims for autonomy from parental and social control become more concrete and compelling.¹⁰⁴ It also reinforces the notion that as ends in themselves, children may not have their destiny decided by others without their involvement in the decision-making process. This claim is supported by section 31 of the Children's Act which provides that holders of parental responsibility may not make major decisions affecting children without giving them an opportunity to be heard and without giving due consideration to their views. While Chapter Three discussed in detail the significance of recognising participation as a general principle in

¹⁰¹ Section 10 of the Children's Act.

¹⁰² Section 5.2.1 of this chapter.

¹⁰³ For a discussion of the property theory, see section 2.1-2.3 of Chapter Two.

¹⁰⁴ This is particularly so if child participation is read alongside the horizontal application of the Children's Act.

international law,¹⁰⁵ its protection at the local level makes the principle directly applicable in South African courts.

The domestic codification of child participation underlines the transformative potential of the Children's Act, demonstrates an awareness of the fact that the political exclusion of children contributes to their vulnerability as a social class,¹⁰⁶ places every child at the centre of the decision-making process, challenges the traditional characterisation of children as property, portrays children as individuals who have interests and identities that are distinct from those of parents and justifies the autonomy of children who have the capacities for rational action.¹⁰⁷ Finally, the recognition of child participation rights alongside largely protective principles and rights demonstrates the gradual movement towards a theory of children's rights which recognises that children get enhanced protection when they are empowered to take part in the relevant decision-making processes.¹⁰⁸

5 THE CATEGORISATION OF CHILDREN'S RIGHTS UNDER SOUTH AFRICAN LAW

Children's rights have generally been categorised into provision, protection and participation rights.¹⁰⁹ These categories of rights amplify the scope of the general principles discussed above and are generally indivisible and mutually reinforcing. Section 28(1)(c) of the Constitution provides that '[e]very child has the right to basic nutrition, shelter, basic health care services and social services'. Further, children are also entitled to the rights of access to adequate housing;¹¹⁰ health care services, sufficient food, water and social security;¹¹¹ and education.¹¹² Section 28(1)(c) protects the minimum base-line every child requires to live a minimally decent life. Sections 26 and 27 broaden the ambit of socio-economic rights as they apply to everyone and

¹⁰⁵ See section 4.4 of Chapter Three.

¹⁰⁶ CJ Davel has argued that '[c]hildren have always been vulnerable yet voiceless members of society'. See CJ Davel 'General principles' in CJ Davel and A Skelton (ed) *Commentary on the Children's Act* (2007) 2-1, 2-2.

¹⁰⁷ Compare with section 4.4 of Chapter Three.

¹⁰⁸ See generally S Human 'The theory of children's rights' in Boezaart (note 17 above) 243, 248.

¹⁰⁹ Section 5 of Chapter Three.

¹¹⁰ Section 26(1)-(3) of the Constitution.

¹¹¹ Section 27(1)-(3) of the Constitution.

¹¹² Section 29(1)-(4) of the Constitution.

stipulate what each person needs ‘to live a full and dignified life’.¹¹³ Whilst they are important for the child’s physical and intellectual development, socio-economic rights are not directly related to the aims of this study and will not be discussed further. Protection rights are revisited because they are important in drawing the boundaries of child participation, parental responsibility and state intervention in decision-making. Further, the Constitution entrenches autonomy-related rights to which ‘everyone’ is entitled¹¹⁴ and these rights affect the relationship between the child, parents and the state. The most relevant of these rights are human dignity, privacy, bodily and psychological integrity; and reproductive health. Below is a discussion of protection, participation- and autonomy-related rights under South African law.

5.1 Protection rights

Both the Constitution and the Children’s Act recognise the centrality of protective measures to the holistic enjoyment by children of all rights. Section 28(1) of the Constitution confers on every child the right to be protected from exploitative labour practices, maltreatment, neglect, abuse or degradation.¹¹⁵ Further, children have a right ‘not to be required or permitted to perform work or provide services that (i) are inappropriate for a person of that child’s age; or (ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development’.¹¹⁶ These provisions have been amplified by statutory provisions in various fields

¹¹³ B Bekink and D Brand ‘Constitutional protection of children’ in CJ Davel (ed) *Introduction to child law in South Africa* (2000) 169, 187. For detailed discussions on the scope of the rights entrenched in sections 26 and 27, see generally M Pieterse ‘Coming to terms with the judicial enforcement of socio-economic rights’ (2004) 20 *South African Journal on Human Rights* 383-417; M Wesson ‘Grootboom and beyond: Reassessing the socio-economic rights jurisprudence of the South African Constitutional Court’ (2004) 20 *South African Journal on Human Rights* 284; D Bilchitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007); C Mbazira *Litigating socio-economic rights in South Africa: A Choice between corrective and distributive justice* (2009); D Olowu *An integrative rights-based approach to human development in Africa* (2009); M Senyonjo *Economic, social and cultural rights in international* (2009); K Mclean *Constitutional deference, courts and socio-economic rights in South Africa* (2009); and S Liebenberg *Socio-economic rights: Adjudication under a transformative Constitution* (2010).

¹¹⁴ Section 7(1) of the Constitution states that ‘[t]he Bill of Rights enshrines the rights of all people in our country’. See also *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) para 52, observing that every child is entitled to the same levels of protection extended to adults by the Bill of Rights.

¹¹⁵ Section 28(1)(d) and (e) of the Constitution. Section 32(1) of the Children’s Act also requires any person (without parental responsibilities and rights) who voluntarily cares for the child to ‘safeguard the child’s health, well-being and development; and [to] protect the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation, and any other physical, emotional or mental harm or hazards’.

¹¹⁶ Section 28(1)(f) of the Constitution

of the law¹¹⁷ and supported by court judgments prohibiting the abuse, maltreatment, neglect or degradation of children.¹¹⁸ In the context of juvenile justice, section 28(1)(g) confer on children the right ‘not to be detained except as a measure of last resort [and] only for the shortest appropriate period of time’.¹¹⁹ Children also have the right ‘not to be used directly in armed conflict, and to be protected in times of armed struggle’.¹²⁰

The protection rights in the Constitution are supported by an array of provisions in the Children’s Act. The latter recognises that ‘it is necessary to effect changes to existing laws relating to children in order to afford them the necessary protection and assistance so that they can fully assume their responsibilities within the community’.¹²¹ Some of the aims of the Children’s Act are to protect children from maltreatment, neglect, abuse or degradation; to improve children’s well-being in line with South Africa’s international obligations; ‘to strengthen and develop community structures which can assist in providing care and protection for children; to protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards; to provide care and protection to children who are in need of care and protection; to recognise the special needs that children with disabilities may have; and generally, to promote the protection, development and well-being of children’.¹²² Further, the whole of Chapter Seven of the Children’s Act deals with the ‘protection of children’ and part three thereof stipulates ‘protective measures relating to the health of children’.¹²³ The relevant provisions govern issues concerning medical treatment, surgical operations, HIV/AIDS and access to contraceptives.

¹¹⁷ See section 10 of the Schools Act 84 of 1997, outlawing corporal punishment as a form of punishment in schools; Chapter 7 of the Children’s Act entrenching detailed child protective measures; Chapter 9 of the Children’s Act establishing the legal machinery for determining whether a child is need of care and protection; and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, broadening the definition of rape, providing for the reporting of the sexual abuse of children and expanding the scope of sexual crimes to include the production, screening or distribution of child pornography and the sexual ‘grooming’ of children. In Chapter Six, the Act also provides for a register for sex offenders.

¹¹⁸ See, for example, *S v Williams* 1995 (3) SA 632 (CC), holding that the sentence of whipping of convicted child offenders is unconstitutional as it violates the right not to be subjected to cruel, inhuman and degrading treatment and *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 50, emphasising that the state is under a duty to protect all people, particularly children, from ‘maltreatment, abuse or degradation’ and that the rationale behind banning corporal punishment is ‘to protect the learner from physical and emotional abuse’.

¹¹⁹ This right includes a further right to be (i) kept separately from detained persons over the age of 18 years; and (ii) treated in a manner and kept in conditions that take account of the child’s age.

¹²⁰ Section 28(1)(i) of the Constitution.

¹²¹ See the preamble.

¹²² Section 2(a)-(i) of the Children’s Act.

¹²³ Sections 129 to 134 of the Children’s Act.

Chapter Nine of the Children's Act outlines a series of procedures that must be followed in establishing whether a child is in need of care and protection. These procedures are meant to ensure that children who are in need of care and protection are placed into appropriate alternative care in line with the command in sections 28 of the Constitution and 2(b)(i) of the Children's Act.

The relevant constitutional provisions emphasise the role of 'age' and the 'evolving capacities of the child' in determining the nature and extent of protection to be extended to children. Further, the Children's Act does not only broaden the scope of protection rights, but also makes protection rights one of the general principles of children's rights. Children have a general right 'not to be subjected to social, cultural and religious practices which are detrimental to [their] well-being'.¹²⁴ To achieve this noble purpose, the Children's Act absolutely bans female genital mutilation; prohibits early or forced marriages; prohibits the virginity testing of girls and circumcision of boys below the age of 16 years; and stipulates that children who are 16 years of age or older may not be forced to undergo virginity testing and male circumcision.¹²⁵ These

¹²⁴ Sections 11(3) and 12(1) of the Children's Act read together.

¹²⁵ Section 12 of the Children's Act stipulates:

- (1) Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being.
- (2) A child-
 - (a) below the minimum age set by law for a valid marriage may not be given out in marriage or engagement; and
 - (b) above that minimum age may not be given out in marriage or engagement without his or her consent.
- (3) Genital mutilation or the circumcision of female children is prohibited.
- (4) Virginity testing of children under the age of 16 is prohibited.
- (5) Virginity testing of children older than 16 may only be performed?
 - (a) if the child has given consent to the testing in the prescribed manner;
 - (b) after proper counselling of the child; and
 - (c) in the manner prescribed.
- (6) The results of a virginity test may not be disclosed without the consent of the child.
- (7) The body of a child who has undergone virginity testing may not be marked.
- (8) Circumcision of male children under the age of 16 is prohibited, except when-
 - (a) circumcision is performed for religious purposes in accordance with the practices of the religion concerned and in the manner prescribed; or
 - (b) circumcision is performed for medical reasons on the recommendation of a medical practitioner.
- (9) Circumcision of male children older than 16 may only be performed
 - (a) if the child has given consent to the circumcision in the prescribed manner;
 - (b) after proper counselling of the child; and
 - (c) in the manner prescribed.
- (10) Taking into consideration the child's age, maturity and stage of development, every male child has the right to refuse circumcision.

provisions take decision-making powers away from parents and children below certain ages.¹²⁶ In this way, the Children's Act is consistent with international law in seeking to eliminate social, cultural and religious practices that are harmful to the life, survival and development of children. This view is shared by Van der Vyver who insists that 'those customs and traditions of a social community that threaten the life or violate the physical integrity of members of the group will clearly not be tolerated under the pretension of [the group's] right to self-determination'.¹²⁷

The breadth of protection rights in the family context domesticates certain provisions of the CRC and the African Children's Charter.¹²⁸ Early marriages, female genital mutilation and other traditional practices violate the rights of children, particularly those of girls.¹²⁹ In addition, the prevalence of forced and unhealthy virginity testing and male circumcision in South Africa calls for paternalism over parents, children and tribal communities in these areas of the law. This is particularly so in light of numerous reported cases of deaths and serious health problems (including the spread of sexually transmitted diseases) emanating from unsafe virginity testing and male circumcision carried out by unqualified persons.¹³⁰ Thus, rights to protection in these cases are about safeguarding the basic interests of children as opposed to promoting their autonomy or the autonomy of parents. As stipulated in Chapter Three, the ultimate goal of all children's rights – including participation rights – is to enhance the child's basic right to life, survival and development.

¹²⁶ See generally JM Kruger 'The protection of children's rights in the South African Constitution: Reflections on the first decade' (2007) 70(2) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 239, 240.

¹²⁷ JD Van der Vyver 'Municipal legal obligations of states parties to the Convention on the Rights of the Child: The South African model' (2006) 20(1) *Emory International Law Review* 9, 17.

¹²⁸ Articles 24(3) of the CRC and 21 of the African Children's Charter.

¹²⁹ See R Mutyaba 'Early marriage: A violation of girls' fundamental rights in Africa' (2011) 19(2) *International Journal of Children's Rights* 339, 339-40, where the author states that early marriages violate children's 'right to life, right to education, right to dignity, freedom from degrading, inhuman and cruel treatment, and protection from harmful traditional practices'.

¹³⁰ See generally L Vincent 'Virginity testing in South Africa: Re-traditioning the post-colony' (2006) 8(1) *Culture, Health & Sexuality* 17-30; ER George 'Virginity testing and South Africa's HIV/AIDS crisis: Beyond rights universalism and cultural relativism toward health capabilities' (2008) 96 *California Law Review* 1447-1519; F Scourgie 'Virginity testing and the politics of sexual responsibility: Implications for AIDS intervention' (2001) 61(1) *African Studies* 55-75; S Bubes 'Boy threatened with death after investigation into circumcision camps: Children kidnapped and mutilated' *Sunday Times* (14 March 1999); M Peters 'Rastafarian circumcised against his will' *IOL News* (4 July 2004) and M Gophe 'Wife held after husband's forced circumcision' *The Cape Argus*. Independent Online News, South Africa (2 April 2005).

Where parental care violates any of the child's protection rights and threatens the child's right to life, survival and development, the state is bound to intervene to promote the best interests of the child. The age and maturity of the child are important factors in drawing the boundaries of state intervention.¹³¹ The Constitution and the Children's Act strip parents and children of the capacity to consent to the child's participation in practices that are harmful to the child's life, survival and development. This explains why section 28(1)(b) of the Constitution and many provisions of the Children's Act contemplate the removal of the child from the family and confers on the child the right to 'appropriate alternative care when removed from the family environment'. Finally, the child's protection rights should be read together with participation- or autonomy-related rights in order to ensure an appropriate balance between these sets of rights.

5.2 Participation-related rights

5.2.1 Direct participation rights

Child participation rights are directly protected in the Children's Act in much the same way they are protected in international law. Section 10 of the Children's Act provides that '[e]very child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration'. Involvement in the decision-making process is open to 'every child' who has an interest in the decision which is about to be made. In order to participate in decision-making, however, the child must be 'of such an age, maturity and stage of development as to be able to participate'.

A literal reading of section 10 suggests that a child must meet the requirements of 'age, maturity and stage of development' for him or her to participate in decision-making. If these requirements are not met, the child may not be allowed to participate. This potentially represents a departure

¹³¹ Section 28(1)(f) emphasises that the child should 'not to be required or permitted to perform work or provide services that (i) are inappropriate for a person of that child's age; or (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development'.

from international law. At international law,¹³² age and maturity are only relevant at the stage of deciding how much weight should be attached to the child's views, but in terms of the Children's Act, 'age, maturity and stage of development' determine whether or not the child is able to participate. This difference becomes evident when we consider the provisions of section 31(1) of the Children's Act. Section 31(1)(a) provides that holders of parental responsibility must, before taking any major decision concerning the child, 'give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development'. Section 31 is consistent with article 12(1) of the CRC in that it confers on every child the right to participate in decision-making and considers the requirements of 'age, maturity and stage of development' as relevant to the process of determining how much weight is to be accorded to the views expressed by the child.

There is no reference to the acquisition of any particular age as the point at which children become eligible to participate and this means that children of all ages have the right to participate in the decision-making process. The phrase 'stage of development' should have been inserted in order to incorporate the common law categorisation of the periods of infancy, childhood and adolescence.¹³³ Therefore, the phrase formally imports the concept of the evolving capacities of the child into the South African legal system. As children grow older and slowly acquire the capacity to make personal decisions in their own best interests, parental responsibility and state intervention diminish until the child becomes an autonomous agent on attaining either the statutory age of consent or majority status.¹³⁴ According to section 61(1) of the Children's Act, children who are of such an 'age, maturity and stage of development' as to be able to participate in court proceedings, should be given an opportunity to express a view and a preference on the matter before the court, provided the child chooses to do so.¹³⁵ Thus, depending on the child's

¹³² See article 12(1) of the CRC and the discussion at section 5.3.1.2 of Chapter Three.

¹³³ However, some may argue that the term 'stage of development' potentially resurrects Piaget's disputed theory that children across all cultures and environments develop through uniform and pre-defined stages. See J Piaget *Six psychological studies* D Alkind (ed) (1967) 5-6 and D Wood *How children think and learn* 2 ed (1998) 52.

¹³⁴ See sections 3.1-3.3 and 4.1-4.3 of Chapter Two.

¹³⁵ Section 61(1) of the Children's Act provides that '[t]he presiding officer in a matter before a children's court must-

- (a) allow a child involved in the matter to express a view and preference in the matter if the court finds that the child, given the child's age, maturity and stage of development and any special needs that the child may have, is able to participate in the proceedings and the child chooses to do so; and

‘age, maturity and stage of development’, the court may give determinative weight to the child’s view or preference.

However, the phrase ‘age, maturity and stage of development’ also signifies the child’s ongoing need for parental care and state protection. It shows that the nature and extent of protection extended to children depends not only on the nature and complexity of the matter requiring decision, but on the child’s age and evolving capacities. At a deeper level, sections 10 and 31 of the Children’s Act seek to reconcile the ongoing tension between children’s developing autonomy and the reality that children need adult protection or guidance in making difficult decisions about which they lack the mental capacity for informed choice.¹³⁶ These provisions recognise that children’s developing autonomy does not deprive them of their right to continued protection, thereby anticipating a perfect harmony between the parental responsibility to protect children from themselves and the child’s right to make independent decisions.¹³⁷

Every child has the right to participate ‘in any matter concerning that child’. This implies that children have the right to participate in a broad range of proceedings that are of particular interest and importance to them, including those that are not explicitly mentioned in the Children’s Act. Section 31 provides insight about the sorts of decisions children should be involved in.¹³⁸ It provides that holders of parental responsibility may not make major decisions without consulting with the child and giving due consideration to the views of the child.¹³⁹ The breadth of what

(b) record the reasons if the court finds that the child is unable to participate in the proceedings or is unwilling to express a view or preference in the matter.

¹³⁶ For a fuller discussion of the protective and emancipatory dimensions of the evolving capacities of the child, see sections 5.3 .1.2 and 6.3 of Chapter Three.

¹³⁷ See A Skelton ‘Constitutional protection of children’s rights’ in T Boezaart (ed) *Child law in South Africa* (2009) 265, 276, arguing in the following terms:

As [children] grow older their capacity gradually develops. The Children’s Act recognises this by providing that “every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child”. The need for protection of their rights continues throughout childhood, and they continue to need assistance with the achievement of their rights due to the fact that their capacity is not fully developed until adulthood. However, parental responsibilities and rights diminish as the child grows older, and the effect of this is that as children grow into adolescents they are likely to exercise the right to choose their religion, express their views, aspire to more personal privacy and make decisions about their relationships with others. The ongoing need for protection and the concurrent development of autonomy creates a mild tension on children’s rights, though both approaches are compatible if it is understood that the need for protection of rights is not dislodged by children’s gradually developing autonomy.

¹³⁸ See also sections 1(1) and 18 of the Children’s Act.

¹³⁹ Section 31 of the Children’s Act provides as follows:

constitutes major decisions is so extensive that it is difficult to imagine decisions that may possibly be made without consulting children. Apart from many other issues, a major decision includes any decision ‘which is likely to significantly change, or to have an adverse effect on, the child’s living conditions, education, health, personal relations with a parent or family member or, generally, the child’s well-being’.¹⁴⁰ This catch-all provision suggests that child participation applies to a wide range of issues and makes it difficult to justify the exclusion of children from the decision-making process.

According to section 10 of the Children’s Act, children are entitled to ‘participate in an appropriate way’. This phrase has no direct equivalent in international law and, in my view, implies two obligations on the part of the state. First, it binds the state to ensure that the manner in which children participate, that is whether directly or through an intermediary or an appropriate body, is consistent with the age and developing competences of the child. Second, it requires the state to ensure that courts or other decision-making forums are child-friendly.¹⁴¹ Thus, the state should remove environmental, language and cultural barriers to effective communication between children and decision-makers.¹⁴² In South Africa, these and other

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- (1) (a) Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b) involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child’s age, maturity and stage of development.
 - (b) A decision referred to in paragraph (a) is any decision-
 - (i) in connection with a matter listed in section 18(3)(c),
 - (ii) affecting contact between the child and a co-holder of parental responsibilities and rights;
 - (iii) regarding the assignment of guardianship or care in respect of the child to another person in terms of section 27; or
 - (iv) which is likely to significantly change, or to have an adverse effect on, the child’s living conditions, education, health, personal relations with a parent or family member or, generally, the child’s well-being.

¹⁴⁰ Section 31(1)(b) of the Children’s Act.

¹⁴¹ To ensure that children participate in ‘an appropriate way’ in domestic courts, section 42(8) outlines a list of essential features that make courts child-friendly. Section 42(8) of the Children’s Act provides that proceedings in the Children’s Court must be done in a room that is (a) furnished and designed in a manner aimed at putting children at ease; (b) conducive to the informality of the proceedings and the active participation of *all persons involved* in the proceedings; (c) is not ordinarily used for the adjudication of criminal trials; and (d) is accessible to disabled persons and persons with special needs.

¹⁴² Fulfilling the need to listen to children in ‘an appropriate way’ may also take the form of innovations such as clothing of the lawyers and court staff, the use of closed-circuit television, separate waiting rooms, the video-taping of evidence, the special preparation of child witnesses and the use of one way screens in the courtroom. See JR Spencer and R Flin *The evidence of children: The law and the psychology* (1990) 83; L Edwards ‘Hearing the voice of the child: Notes from the Scottish experience’ in CJ Davel (ed) *Children’s rights in a transitional society* (1999) 37, 39; R Pillay and N Zaal ‘Child interactive video recordings: A proposal for hearing the voices of children in divorce matters’ (2004) *South African Law Journal* 684; D Kassan *How can the voice of the child be adequately heard in family law proceedings?* Unpublished LLM Dissertation, University of the Western Cape; and R Eatman

factors have been reported to impede genuine child participation in judicial proceedings.¹⁴³ Overall, the significance of the phrase ‘participate in an appropriate way’ is that it represents an open recognition of the fact that effective participation goes beyond the legislative protection of participation rights and requires concrete steps to be taken to ensure that children are encouraged to express their views openly before decision-making bodies.

Finally, the ‘views expressed by the child must be given due consideration’. This means that the child’s views should be taken seriously in the sense that they must play an important role in the decision-making process. ‘Due consideration’ signifies a move away from mere tokenism towards meaningful participation in decision-making. However, this does not mean that the views of the child should always be given determinative weight. As observed in Chapter Three, the weight to be given to the child’s views depends not only on the nature and complexity of the matter requiring decision, but on the evolving capacities and best interests of the child.¹⁴⁴ ‘Due consideration’ at domestic law matches ‘due weight’ at international law and emphasises the role of the child’s views in determining the child’s best interests. Whilst domestic courts have sought to involve children in the decision-making process for more than 40 years, they have generally been reluctant to give ‘due consideration’ to the child’s views.¹⁴⁵

Generally, courts have been inclined to give due consideration to the views of older children while disregarding those of younger children.¹⁴⁶ Another related challenge, with earlier cases,

and J Buckley *Protecting child victims/witnesses* American Bar Association National Legal Research Centre for Child Advocacy and Protection (1986) 21.

¹⁴³ On how the physical environment of courts, the attire of lawyers or judges or prosecutors, and language and cultural barriers impede child participation, see N Zaal ‘Hearing the voices of children in court: A field study and evaluation’ in S Burman (ed) *The fate of the child: Legal decisions on children in the new South Africa* (2003) 158, 161-62.

¹⁴⁴ See section 5.3.1.2 of Chapter Three.

¹⁴⁵ See *Oppel v Oppel* 1973 (3) SA 675 (T), where the Court held that an eight year old child was too young to express a view in a matter concerning access; *Manning v Manning* 1975 (4) SA 659 (T) where the custody of a boy of more than nine years of age was decided without giving the child an opportunity to be heard and *Mathews v Mathews* 1983 (4) SA 136 (SE), where it was held that while the views of a 13 year old could not have much weight, those of a 17 year old child could be a factor deserving serious consideration when decisions are being made.

¹⁴⁶ See, for example, *Greenshields v Wyllie* 1989 (4) SA 898 (W) at 899C-F, where the Court, after acknowledging that children are ‘human beings’ and ‘have ‘personalities and emotional preferences of their own’, held as follows:

At the age of 12 and 14 it is particularly difficult to know who you are and where you are going and where you belong. Everyone knows that...But the court also knows that as time goes by, their own perspective changes. It is then that they long for having both the father and the mother; it is then that they regret not having built up a good relationship. ... For those reasons, because the Courts know that children grow up,

appears to have been the belief that competence is an all or nothing concept in terms of which the child, based on his or her arithmetical age, either possesses or lacks it completely.¹⁴⁷ Nonetheless, later cases – especially those decided after the birth of the new democratic order – demonstrate a shift in the approach of judges as courts became inclined to take the maturity of the child into account, rather than his or her age alone.¹⁴⁸ In *De Groote v De Groote*,¹⁴⁹ Chetty J lamented the apparent disregard, by professionals who had compiled reports for the court, of the provisions of sections 10 and 31 of the Children’s Act. The Court held that ‘[b]y all accounts the children are of an age and maturity to fully comprehend the situation and their voices cannot be stifled, but must be heard’.¹⁵⁰ Chetty J ultimately decided that he was bound by sections 10 and 31 of the Children’s Act to give due weight to the views and wishes of the children concerned as

that their perspectives change, that their needs change, a court is not inclined to give much weight to the preferences of children of 12 and 14. It is not because what they say is not important, but because the Courts know that there is more to it than the way they respond emotionally at this stage.

¹⁴⁷ A Barratt ‘The best interests of the child: Where is the child’s voice?’ in Burman (note 139 above) 145, 151. See also *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C) at 439J, dismissing the child’s views because their reasons for not wanting to relocate to Australia with their custodial mother were ‘so childishly immature that I am satisfied that it would be unwise and indeed irresponsible to have any regard to such preferences as are supposed to have been expressed’.

¹⁴⁸ See *B v P* 1991 (4) SA 113 (T), where the court ordered that the child be re-interviewed to ascertain their wishes; *Märtens v Märtens* 1991 (4) SA 287 (T), where the Court considered it vitally important to speak, directly, to 11 year old twins, and observed that the children concerned, though lacking in maturity, were intelligent and could express themselves confidently in the circumstances; *McCall v McCall*, where the Court upheld a 12 year old child’s choice to live with his father as this choice had been explicitly conveyed by an intelligent and articulate child endowed with the requisite maturity and intellectual development to make an informed decision in his own best interests; *Meyer v Gerber* 1999 (3) SA 550 (O), where the Court was satisfied that the parties’ 15 year old son had the required emotional and intellectual maturity to make a calculated and intelligent decision and that due weight should be attached to his stated choice. According to the Court, there was some stability in the child’s preference; the boy had thought about the matter for a protracted period of time and his views were not an emotional reaction to developments in his life; *H v R* 2001 (3) SA 23 (C), where the Court seriously considered the views of the child, but did not give them determinative weight; *I v S* 2002 (3) SA 993 (C) at 997D-H/I, where the Court was satisfied that the three children’s views were sufficient to override their father’s access rights based on the psychiatrist’s report that the children were ‘sufficiently mature and old enough to give an independent opinion of their refusal to have any contact with their father’; *Lubbe v Du Plessis*, where the Court, at 73H-J, considered the views of all the three children aged between six and 10 years and held that the oldest child ‘is sufficiently mature to form and express “an intelligent and informed judgment on what he subjectively perceives to be in his best interests” and that he has a strong desire to live with his father’; *R v H* 2005 (6) SA 535 (C) where the Court considered the views of a 10 year old boy; *F v F* 2006 (3) SA 42 (SCA) para 18, where the Court held that the views of the child could not be ignored; *Soller No v G and Another* 2003 (5) SA 430 (W) para 56, where the Court held that although the child’s expressed preference to live with his father only had persuasive value, it had become the determining factor in the circumstances of the case; and *Kleynhans v Kleyhans* [2009] JOL 24013 (ECP), where the Court considered the views of children aged 13 and 16 years and made the comment that the two children were not babies, could think independently and were justified ‘in feeling insulted if forced into a situation in which they are treated in a way prescribed by the recommended regime’.

¹⁴⁹ Unreported case no 1408/2009 (ECD) handed down 10 September 2009.

¹⁵⁰ Para 17.

they were of such an age and maturity as to make informed decisions.¹⁵¹ On the whole, sections 10 and 31 of the Children's Act largely incorporate article 12 of the CRC into the domestic legal system, thereby complying with South Africa's international obligations in this respect.¹⁵²

5.2.2 The right of access to court and rules governing standing

The right of access to court and rules governing standing play an important role in promoting child participation rights. Section 14 of the Children's Act confers on every child 'the right to bring, and to be assisted in bringing a matter to court', provided the court has the jurisdiction to entertain the matter in question. Further, anyone listed in section 15 of the Children's Act has the right to approach a competent court, alleging that a right in the Bill of Rights or the Children's Act has been infringed or threatened; and the court may grant appropriate relief, including a declaration of rights.¹⁵³ Persons listed in section 15 include, among others, (a) a child who is affected by or involved in the matter to be adjudicated or (b) anyone acting in the interest of the child.¹⁵⁴ Read together with statutory rules liberalising *locus standi*, the child's right to bring or to be assisted in bringing a matter to court promotes child participation in judicial proceedings.

While a literal reading of sections 14 and 15 of the Children's Act supports the view that children can now litigate wholly unassisted,¹⁵⁵ courts are likely to continue insisting that children

¹⁵¹ Para 21.

¹⁵² See Davel (note 106 above) 2-14.

¹⁵³ Section 15 of the Children's Act provides as follows:

- (1) Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights or this Act has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights;
- (2) The persons who may approach a court, are:
 - (a) A child who is affected by or involved in the matter to be adjudicated;
 - (b) anyone acting in the interest of the child or on behalf of another person who cannot act in their own name;
 - (c) anyone acting as a member of, or in the interest of, a group or class of persons; and
 - (d) anyone acting in the public interest.

¹⁵⁴ Section 53(2)(e) of the Children's Act also refers to anyone acting as a member of or in the interest of, a group or class of children.

¹⁵⁵ There is lack of clarity on whether section 14, particularly the phrase 'every child', practically allows children to litigate without the assistance of a parent, guardian or *curator ad litem*. Heaton is of the view that section 14 amends the common law and confers on an *infans* the capacity to litigate, thereby entitling him or her to such assistance as is needed to supplement his or her limited capacity to litigate; Skelton argues that '[i]t is evident that children can act in their own name, and can litigate all the way to the Constitutional Court'; and Boezaart adopts a more guarded

should be assisted in bringing matters to court. This is because of the vulnerability and immaturity of many children as well as the procedural difficulties associated with adversarial litigation. Where the interests of the child and those of the parent are inconsistent, courts are likely to insist that the child be assisted by a curator *ad litem* or some other neutral person or body.¹⁵⁶ A holistic reading of the Children's Act does not support the view that children are entitled to approach the courts wholly unassisted by an adult who provides some guidance, and moral or technical support.¹⁵⁷ In *Legal Aid Board in re Four Children*,¹⁵⁸ the Court nearly confirmed the child's capacity to litigate to protect his or her rights without the assistance of parents, but not completely unassisted.¹⁵⁹ The child still partially lacks the capacity to litigate and must be assisted by a legal representative, any interested person or the High Court as upper guardian of all minors. Due to the need to protect children from the stresses of adversarial litigation, courts are likely to stress the importance of keeping children away from direct involvement in court proceedings.¹⁶⁰

Section 14 of the Children's Act partially changes the common law in that it does not differentiate between an *infans* and a minor,¹⁶¹ but codifies every child's right to bring or to be assisted in

approach and posits that while it is evident that the Legislature intended to extend to every child the right to access to courts, it is doubtful whether such an intention included supplementing the *infans*' capacity to litigate. See J Heaton *Law of Persons* (2008) 90-92; A Skelton 'Constitutional protection of children's rights' in Boezaart (note 17 above) 265, 280-82 and Boezaart (note 17 above) 22-23.

¹⁵⁶ On the courts' tendency to rely on the assistance offered by a curator *ad litem*, see *Legal Aid Board in re Four Children* (512/10) [2011] ZASCA 39 (2011-03-29) para 12; *AD v DW (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* 2008 (3) SA 183 (CC) para 61; *S v M* para 31; and *Centre for Child Law and Another, Ellis, v Minister of Home Affairs and others* (2005 (6) SA 50 (T).

¹⁵⁷ S 22(6)(a)(ii), 22(6)(b)(ii) and 28(3)(c) of the Children's Act. These provisions allow, for instance, a child to bring an application, with leave of the court, for the amendment or termination of a parental responsibilities and rights agreement. If regard is had to sections 22 and 28 of the Children's Act, it is clear that the child may only bring applications unassisted by the parent or guardian, only 'with the leave of the court'. If sections 14 and 15 of the Children's Act granted the child the capacity to litigate unassisted by an adult, section 22(6) of the Children's Act would not have required the court's approval of the child's intention to litigate unassisted by an adult. The need for the court's approval arises from the fact that the majority of applications emanate from conflicts with a parent or guardian and the child will most likely not have the assistance of such parent or guardian due to conflict of interests.

¹⁵⁸ Note 152 above.

¹⁵⁹ Para 29. See also *Legal Aid Board v R* 2009 (2) SA 262 (DCLD), for *obiter dicta* to this effect.

¹⁶⁰ For instance, lawyers in England have noted 'disturbing evidence of judicial reluctance to acknowledge the right of children to be in court'; even in cases where the child had sufficient understanding in the context of the proceedings in which he or she wished to participate. See C Lyon and N Parton 'Children's rights and the Children Act 1989' in B Franklin (ed) *The handbook of children's rights: Comparative policy and practice* (1995) 40, 51-53 and A James 'Responsibility, children and childhood' in J Bridgeman, J Keating and C Lind (eds) *Responsibility, Law and the Family* (2008) 153 and 154.

¹⁶¹ At common law, an *infans* (a child below the age of seven years) lacks the capacity to litigate and thus cannot sue or be sued in their own name. Instead, the parent or guardian of an *infans* can sue or be sued on behalf of an *infans*,

bringing matters to court. According to Boezaart, '[t]he fact that a child sometimes has no capacity to litigate on his or her own does not deprive that child of the right of access to a court in terms of section 14 of the Children's Act'.¹⁶² Therefore, the right of access to court and the liberalisation of *locus standi* promote child participation in judicial proceedings affecting children.¹⁶³ Sections 14 and 15 of the Children's Act create space for the practical realisation of the right entrenched in sections 10 and 31 of the Children's Act. They connect the child's general right to participate with his or her procedural right to be heard in court proceedings.

Access to court and the liberalisation of *locus standi* enable children to approach formal courts and seek remedies for breaches of their rights, provided they have the requisite assistance from another adult, not necessarily the parent, who is willing or legally bound to assist the child. The child or anyone acting on their behalf should approach the court if the rights 'in the Bill of Rights or the Act' have 'been infringed or threatened'. These rights include those conferring on children the autonomy to make personal decisions as discussed below.¹⁶⁴ More importantly, the child may launch protection proceedings intended to prevent violations of rights that have only been 'threatened' by parents or the state. Where there are parent-child conflicts, the child may now bring claims against parents since the child does not necessarily have to rely on the discretion of the parent or guardian in determining whether the matter should reach the courts.

At common law, minors could only litigate with the assistance of parents or guardians. This left minors with limited options for initiating litigation where violations of rights had been perpetrated by those meant to assist the child in bringing matters to court. Today, the Bill of

but the *infans* remains the party to the lawsuit and not the parent or legal guardian. Minors, namely children over the age of seven years, have limited capacity to litigate and therefore can, with the help of the parent or legal guardian, sue or be sued in their own name. The parent or guardian can also institute legal proceedings on behalf of the minor. Whether the minor is or is not assisted by the parent or guardian, the result is that it is the minor who is a party to the proceedings before the court. See E *Spiro Law of parent and child* 4 ed (1985)199; Boezaart (note 17 above) 34-35 and A Cockrell 'Capacity to litigate' in Van Heerden, Cockrell and Keightley (note 3 above) 897-900.

¹⁶² T Boezaart and DW de Bruin 'Section 14 of the Children's Act 38 of 2005 and the child's capacity to litigate' (2011) 25 *De Jure* 416, 420.

¹⁶³ As stated by the Constitutional Court in *MEC for Education, KwaZulu Natal v Pillay* 2008 (1) SA 474 (CC) para 56, '[i]t is always desirable; and may sometimes be vital, to hear from the person whose religion or culture is at issue. That is often no less true when the belief in question is that of a child. Legal matters involving children often exclude the children and the matter left to adults to engage and decide on their behalf'. See also *Antonie v Governing Body, Settlers High School and Others* 2002 (4) SA 738 (C), where a 15 year-old girl successfully brought an application in her own name.

¹⁶⁴ See section 5.3 of this Chapter.

Rights applies to ‘all law’,¹⁶⁵ governs horizontal relationships,¹⁶⁶ makes a break with the public/private dichotomy, challenges the historical emphasis on family privacy or parental autonomy and questions the old-age myth that non-state actors bear no duties under social contract to protect other people’s rights.¹⁶⁷ Given that many violations of children’s rights tend to occur in the name of family privacy, the provisions governing the horizontal application of human rights, access to court and standing, constitute a significant step towards the full implementation of the child’s right to be heard. Section 15 of the Children’s Act authorises children, the state and other public interest organisations to sue parents or guardians who are responsible for the abuse, neglect or exploitation of children.¹⁶⁸ This is important for the protection of the very young who suffer abuse or exploitation at the hands of parents or guardians. Finally, the right to be assisted in bringing matters to court is closely related to the right to legal representation as lawyers are often responsible for assisting children to sue parents, guardians and state functionaries responsible for breaches of children’s rights.

¹⁶⁵ Section 8(1) of the Constitution provides that ‘the Bill of Rights applies to *all law*’. The phrase ‘all law’ includes common, statutory and non-statutory law and therefore includes family or child law. This is consistent with the prescription, found in section 2 of the Constitution, that the Constitution is the supreme law of the land and that all law or conduct inconsistent with it is invalid to the extent of its inconsistency. In *Pharmaceutical Manufacturers Association of SA: In re: ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 44, Chaskalson P held that ‘[t]here is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control’.

¹⁶⁶ Section 8(2) of the Constitution states that ‘[a] provisions of the Bill of Rights binds a natural or a juristic person if and to the extent that it is applicable, taking into account the nature of the right and the duty imposed by the right’; section 39(2) of the Constitution provides that ‘when interpreting any legislation, and when developing the common law or customary law, every court...must promote the spirit, purport and objects of the Bill of Rights’; and section 8(3) of the Children’s Act provides that ‘a provision of the Bill of Rights or the Act binds a natural...person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right’. These sections provide for direct and indirect horizontal application of the Bill of Rights. For a comprehensive discussion of the difference between direct and indirect horizontality, see D Chirwa ‘The horizontal application of constitutional rights in comparative perspective’ (2006) 10(2) *Law, Democracy and Development* 21, 37-45; C Sprigman and S Osborne ‘*Du Plessis* is not dead: South Africa’s 1996 Constitution and the application of the Bill of Rights to private disputes’ (1999) 15 *South African Journal on Human Rights* 25; and C Roederer ‘Post-matrix legal reasoning: Horizontality and the rule of values in South African law’ (2003) 19 *South African Journal on Human Rights* 57.

¹⁶⁷ For a detailed discussion of this approach to human rights, see M MacDonald ‘Natural rights’ in J Waldron (ed) *Theories of rights* (1984) 21; A Pollis ‘Towards a new universalism: Reconstruction and dialogue’ (1998) 16(1) *Netherlands Quarterly of Human Rights* 5, 10; M Freeman ‘Is a political science of human rights possible’ (2001) 19(2) *Netherlands Quarterly of Human Rights* 123, 125; and D Chirwa *Towards binding economic, social and cultural rights obligations of non-state actors in international and domestic law: A critical survey of emerging norms*, A thesis submitted in full fulfilment of the requirements for the degree Doctor Legum in the Faculty of Law of the University of the Western Cape (2005) 38-46.

¹⁶⁸ In the case of *Centre for Child Law v Minister of Justice and Constitutional Development and Others (National Institution for Crime Prevention and Reintegration of Offenders, as Amicus Curiae)* 2009 (2) SA 125 (CC), the Centre for Child Law was allowed to institute proceedings in the public interest and in its own interests, in order to protect children who faced the risk of being sentenced under the statutory provisions on minimum sentences.

5.2.3 The right to legal representation

Section 28 of the South African Constitution confers on children the right to legal representation. Section 28(1)(h) of the Constitution and 29(6) of the Children's Act¹⁶⁹ entrench every child's right to have a legal practitioner assigned to him or her in civil proceedings affecting the child, if substantial injustice would otherwise result. This is consistent with the child's right to be heard, 'either directly or through a representative or appropriate body', in judicial and administrative proceedings affecting the child.¹⁷⁰ Therefore, section 28(1)(h) is consistent with article 12(2) of the CRC in recognising that children may be heard through representatives, but it confines such representatives to practicing lawyers. In this respect, it has been observed that 'the South African Constitution provides better protection since it does not allow for non-lawyers to substitute for lawyers in court proceedings'.¹⁷¹

5.2.3.1 *The duties of legal representatives*

The term 'legal practitioner' as used in section 28(1)(h) must be construed broadly to embrace the appointment of either a curator *ad litem* or a separate legal representative who narrates the views of the child.¹⁷² The nature of the legal practitioner's role largely turns on the child's age and capacity or willingness to instruct counsel. With the very young, legal representation is tantamount to advocating the best interests of the child. As children grow in age and intelligence, the legal representative should restate the child's views and seek to have them enforced by the courts. A legal representative should take the side of the child and act as the child's emissary.¹⁷³

¹⁶⁹ Read with section 55(1) of the Act.

¹⁷⁰ See article 12 of the CRC. See also article 4(2) of the African Children's Charter which refers to the child's right to be heard 'either directly or through an impartial representative *as a party* to the proceedings'.

¹⁷¹ N Zaal and A Skelton 'Providing effective representation for children in a new constitutional era: Lawyers in the criminal and children's courts' (1998) 14 *South African Journal on Human Rights* 539, 541.

¹⁷² See also C Du Toit 'Legal representation of children' in Boezaart (note 17 above) 93, 97 and M Carnelley 'The right to legal representation at state expense for children in care and contact disputes – A discussion of the South African legal position with lessons from Australia' (2010) 31(3) *Obiter* 638, 650.

¹⁷³ In *Soller No v G and Another* 2003 (5) SA 430 (W) paras 26-27, Satchwell J held as follows:

Neutrality is not the virtue desired but rather the ability to take the side of the child and act as her agent or ambassador... The legal practitioner stands squarely in the corner of the child and has the task of presenting

While the lawyer is bound to ensure that the child's views are heard, he or she should not merely be the child's mouth piece.

As with any lawyer, a child's lawyer should be both an advocate and a counsellor for the client. He or she should, without unduly influencing the child, provide the child with options and information to assist the child in making decisions. To represent children meaningfully, lawyers should have the requisite communication skills and practical knowledge on how best to reach out to the child and present the child's views accurately.¹⁷⁴ They should have the capacity to ascertain the views of the child, present them logically and argue from the perspective of the child in the face of doubt and opposition from other parties or the court.¹⁷⁵ This duty requires the lawyer to have the competence to understand and interpret the child's views in light of his or her age, maturity, development, education, background and social environment.¹⁷⁶

5.2.3.2 *The significance of legal representation*

Section 28(1)(h) is designed to protect children by ensuring that the interests of children who are affected by litigation are adequately protected. More importantly, section 28(1)(h) has the potential to enhance the enjoyment of participation rights and the recognition of children's developing autonomy.¹⁷⁷ This is because it recognises that as children mature, their views become critical in the judicial resolution of conflicts affecting them. As has been noted, section '28(1)(h) provides a platform for children to be directly involved in civil litigation and for legal representatives to place the views of the children before the court'.¹⁷⁸ The right to legal

and arguing the wishes and desires of that child... The legal practitioner does not only represent the perspective of the child concerned. The legal practitioner should also provide adult insight into those wishes and desires which have been confided and entrusted to him or her as well as apply legal knowledge and expertise to the child's perspective. The legal practitioner may provide the child with a voice but is not merely a mouthpiece.¹⁷³

¹⁷⁴ See *Draft Guidelines for Legal Representatives of Children in Civil Matters* (2010) 11.

¹⁷⁵ *Soller No v G and Another* para 26. See also P Parkinson 'The child participation principle in child protection law in New South Wales' (2001) 9 (3) *The International Journal of Children's Rights* 259, 260

¹⁷⁶ A Barratt 'The child's right to be heard in custody and access determinations' (2002) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 556, 570.

¹⁷⁷ For an informative exploration of the significance of the right to counsel, see BC Feld 'The right to counsel in the juvenile court: An empirical study of when lawyers appear and the difference they make' in BC Feld (ed) *Readings in juvenile justice administration* (1999) 127, 134-39.

¹⁷⁸ A Friedman, A Pantazis and A Skelton 'Children's rights' in S Woolman, T Roux, J Klaaren, A Stein and M Chaskalson (eds) *Constitutional law of South Africa* 2 ed RS 4 (2012) 47-1, 47-37. See also *Ex parte van Niekerk*

representation applies to a broad range of proceedings, including care and contact, and is available to all children. It is available not only to children capable of forming and conveying views, but to every child who is likely to suffer ‘substantial injustice’ as a result of the non-appointment of counsel.¹⁷⁹ The Constitutional Court has emphasised the significance of a curator *ad litem* in promoting child participation in decision-making.¹⁸⁰

Legal representation is important when the interests of the child are in conflict with the interests of parents. The best interests of the child and those of parents ‘may not always intersect’.¹⁸¹ As a result, legal representation underlines the state’s duty, at its own expense, to protect children from the harmful effects of family conflicts.¹⁸² Courts have held that where it is evident that the child’s voice is being drowned out by the warring voices of parents, the failure to afford the child a legal representative will necessarily cause ‘substantial injustice’ to the child.¹⁸³ This is particularly so where both parents are represented and the child is not.¹⁸⁴

[2005] JOL 14218 (T) para 8, allowing for children to be joined as parties to enable them to participate in judicial proceedings.

¹⁷⁹ C Davel ‘The child’s right to legal representation in divorce proceedings’ in C Nagel (ed) *Gedenkbundel vir JMT Lubaschagne* (2006) 21.

¹⁸⁰ In *Christian Education South Africa v Minister of Education* at 787, the Constitutional Court held:

We have not had the assistance of a curator *ad litem* to represent the interests of the children. It was accepted in the High Court that it was not necessary to appoint such a curator because the State would represent the interests of the child. This was unfortunate. The children concerned were from a highly conscientised community and many would have been in their late teens and capable of articulate expression. Although both the State and the parents were in a position to speak on their behalf, neither was able to speak in their name. A curator could have made sensitive inquiries so as to enable their voice or voices to be heard. Their actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual and experiential foundation for the balancing exercise in this difficult matter would have been more secure.

See also *MEC for Education v Pillay* 2008 (1) SA 474 (CC) 494E-G.

¹⁸¹ See *Soller No v G and Another* 2003 (5) SA 430 (W) at 434-35, paras 7-8, where the court held that ‘[t]he significance of section 28(1)(h) lies in the recognition...that the child’s interests and the adults’ interests may not always intersect and that a need exists for separate legal representation of the child’s views’. In appointing a legal representative for children under section 28(1)(h), the Court in *R v H and Another* 2005 (6) SA 535 (C) 539, held that the drastic nature of the relief sought by the mother which would dissolve contact between the father and the child; the possibility that the interests of the child may be inconsistent with those of the custodian and *the interests of justice*, required that the child’s views be heard.

¹⁸² For academic authority on the view that ‘substantial injustice’ does not qualify ‘state expense’, but the right to legal representation, see G Budlender ‘Access to courts’ (2004) 121 *South-African Law Journal* 339, 347 and L Stewart ‘Resource constraints and a child’s right to legal representation in civil matters at state expense in South Africa’ (2011) 19 *International Journal on Children’s Rights* 295, 307-08.

¹⁸³ *Legal Aid Board v R and Another* 2009 (2) SA 262 (D) 269G, para 20.

¹⁸⁴ In such instances, the child or someone acting on behalf or in the interest of the child may bring the matter to court and request that ‘a legal practitioner [be] assigned to the child at state expense’ to ensure that ‘substantial injustice’ does not ‘otherwise result’. See generally *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T) para 28-29; *Rosen v Havenga* (2006) 4 All SA 199 (C) para 6 and *Du Toit v Minister of Welfare and Population*

Further, in light of the powerlessness and immaturity of many children, the right to legal representation creates room for others to initiate protection proceedings in the interests of abused or exploited children. Read with the child's right to be assisted in bringing matters to court,¹⁸⁵ legal representation 'at state expense' enables children to initiate proceedings against abusive parents and to participate in their own protection. In order to establish whether 'substantial injustice' would result if a legal representative were not appointed, consideration must be had to the child's age and capacity to express own views, the complexity of the case and the likely impact of the ultimate decision on the life of the child.¹⁸⁶ These factors determine whether the state should afford children protection and participation through legal representation. This approach emphasises the indivisibility of child protection and participation rights. Finally, the child's legal representation also has horizontal effect as the Court may 'order the parties to the proceedings, or any one of them, or the state if substantial injustice would otherwise result, to pay the costs of such representation'.¹⁸⁷ Such parties may be parents.

5.3 Autonomy-related rights

5.3.1 The right to privacy

The right to privacy is one to which 'everyone' is constitutionally entitled.¹⁸⁸ Privacy is an elusive concept and, if construed widely, extends to almost all aspects of human life. At common

Development para 3, where the Court held that '[i]n matters where the interests of children are at stake, it is important that their interests are fully aired before the Court so as to avoid substantial injustice to them and possibly others. Where there is a risk of injustice, a court is obliged to appoint a curator to represent the interests of children'.

¹⁸⁵ Section 14 of the Children's Act. There is an inherent link between the right to legal representation and the right to be assisted in bringing a matter to court.

¹⁸⁶ J Sloth-Nielsen 'Children' in H Cheadle, D Davis and N Haysom (eds) *South African constitutional law: The Bill of Rights* (2002) 526-37. See also D Kassan 'Children's right to legal representation in divorce proceedings' in J Sloth-Nielsen and Z Du Toit (eds) *Trials and tribulations, trends and triumphs: Developments in international, African and South African child and family law* (2008) 227, 237-38.

¹⁸⁷ Section 29(6) of the Children's Act.

¹⁸⁸ Section 14 of the Constitution provides that '[e]veryone has the right to privacy, which includes the right not to have-

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or

law, privacy has been long recognised as a separate personality right which forms part of the wide concept of ‘dignitas’.¹⁸⁹ As Neethling et al observe, privacy is ‘the sum total of information or facts relating to an individual in his condition of seclusion and which are thus excluded from the knowledge of outsiders’.¹⁹⁰ This definition has largely been accepted by domestic courts.¹⁹¹ Thus, privacy is characterised by the individual’s seclusion from the public domain to the degree determined by the individual¹⁹² and confirmed to be objectively reasonable by the community in which an individual resides. Privacy has two, possibly three, components.¹⁹³ According to Van der Bank, the concept of privacy can be divided into clusters which include:

- ‘privacy related to choice – the right to make a choice without state interference;
- privacy relating to flow of personal information; [and]
- spatial privacy- the extent to which a person’s individual territorial space is shielded from invasion’.¹⁹⁴

This study is partly concerned with those elements of privacy related to decisional autonomy on intimate matters of life.¹⁹⁵ As observed in Chapter Three, this facet of privacy enables children to

(d) the privacy of their communications seized’.

¹⁸⁹ See *O’Keeffe v Argus Printing and Publishing Co Ltd* 1954 (3) SA 244 (C) at 247 and *S v A* 1971 (2) SA 293 (T) at 297G-H. See also J Church, C Schulze and H Strydom *Human Rights from an international and comparative law perspective* (2007) 196-201 and 225-68; GE Devenish *A Commentary on the South African Constitution* (1998) 56 and N Shaik-Peremanov ‘Basel II – The right to privacy: A South African perspective’ (2009) 21 *South African Mercantile Law Journal* 546, 549.

¹⁹⁰ J Neethling, PJ Visser and JM Potgieter *Neethling’s law of personality* (1996) 34.

¹⁹¹ *Bernstein v Bester NO* 1996 (2) SA 751 (CC) (hereafter *Bernstein v Bester*) at 789; *Jooste v National Media Ltd* 1994 (2) SA 634 (C) at 645; *National Media Ltd v Jooste* 1996 (3) SA 262 (A) at 271; *Swanepoel v Minister van Veiligheid en Sekuriteit* 1999 (4) SA 549 (T) at 553 and *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T) at 384.

¹⁹² J Neethling ‘The protection of the right to privacy against fixation of private facts’ (2004) 121 *The South African Law Journal* 519, 519, where the author states that ‘since the individual himself determines the scope of his interest in privacy, this power or competence of self-determination is considered to be the essence of the individual’s interest in privacy, and therefore also of his right to privacy’.

¹⁹³ See IM Rautenbach ‘The conduct and interests protected by the right to privacy in section 14 of the constitution’ (2001) *Journal of South African Law* 115, 119, where the author states that ‘the right to privacy in section 14 protects one’s actions to control (i) access to personal matters, and (ii) the obtaining, dissemination and use of information in respect of these matters’.

¹⁹⁴ CM Van der Bank ‘The right to privacy – South African and comparative perspectives’ (2012) 1(6) *European Journal of Business and Social Sciences* 77, 78.

¹⁹⁵ The constitutional right to privacy largely embodies claims against government or private regulation of self-regarding behaviour – an idea that lies at the heart of philosophical defences of individual liberty. See generally JS Mill *On liberty* (1869) J Manis (ed) (The Pennsylvania State University; 1998) 12-13; C Fred ‘Privacy’ (1968) 77(3) *Yale Law Journal* 475; SI Benn ‘Privacy, freedom and respect for persons’ in JR Pennock and JW Chapman (eds) *Nomos XIII: Privacy* (1971) 1, 12, where the author argues that ‘any man who desires that he himself should not be

claim privacy rights within the family, to limit the scope of parental control on intimate matters of life and to exercise autonomy rights in the context of sexual and reproductive health.¹⁹⁶ Privacy becomes more intense the moment other persons, society and the state move closer to the individual's space, person and home.¹⁹⁷ There is an untouchable sphere of privacy which relates to personal matters of life such as marriage, the family environment, sexual choices and matters regarding reproduction.¹⁹⁸ '[T]his inviolable core is narrowly construed' and is 'left behind once an individual enters into relationships with persons outside this closest intimate sphere'.¹⁹⁹ In *Case and Curtis v Minister of Safety and Security*,²⁰⁰ the right to privacy was also construed to include the individual's autonomy in making decisions about sexual and family life.²⁰¹

The right to privacy has implications for minors' sexuality and reproductive autonomy as it allows every person to claim privacy on intimate matters of life.²⁰² In *Teddy Bear Clinic for*

an object of scrutiny has a reasonable *prima facie* claim to immunity'; J Rachels 'Why privacy is important' (1975) 4(4) *Philosophy and Public Affairs* 323-33; D McQuoid-Mason *Law of Privacy in South Africa* (1978) 99; RG Frey 'Privacy, control and talk of rights' in EF Paul, FD Miller and D Paul (eds) *The right to privacy* (2000) 45, 55; and I Currie 'The concept of privacy in the South African Constitution' (2008) 3 *Journal of South African Law* 549, 552.

¹⁹⁶ See section 5.3.2 of Chapter Three.

¹⁹⁷ In *Bernstein v Bester* para 77, The Constitutional Court once held as follows:

A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place. But this most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual's activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation.

¹⁹⁸ See *Bernstein v Bester* paras 67 and 69. See also *Mistry v Interim Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (CC) paras 23 and 27, and *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (6) SA 642 (CC) para 80, where it was held that 'an invasion of the relationship between partners, or parent and child, or other intimate, meaningful and intensely personal relationships will be a strong indication of a violation close to the core of privacy'.

¹⁹⁹ *Bernstein v Bester* para 77.

²⁰⁰ 1996 (3) SA 617 (CC).

²⁰¹ Para 91.

²⁰² In *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 32, the Court held as follows:

Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.

See also SY Lai and RE Ralph 'Female sexual autonomy and human rights' (1995) 21 *Harvard Human Rights Journal* 201, 222-23, where the authors argue that '[t]he right to privacy arguably includes a third aspect-a sphere of

Abused Children and Another v Minister of Constitutional Development and Another (hereafter *Teddy Bear Clinic*),²⁰³ the Constitutional Court held that the principles relating to private intimacy and autonomy apply ‘with equal force to the consensual sexual conduct of adolescents, because the criminal offences under sections 15 and 16 of the Sexual Offences Act apply to the most intimate sphere of personal relationships and therefore inevitably implicate the constitutional right to privacy’.²⁰⁴ The Court further held that the relevant statutory provisions violated adolescents’ right to privacy.²⁰⁵ This decision has far-reaching implications for mature minors’ participation, parental responsibility and state intervention in the context of health care decision-making, including matters relating to reproduction and abortion.²⁰⁶ Elsewhere, privacy claims have been interpreted to include competent minors’ right to make decisions, without parental consent, concerning reproduction and abortion.²⁰⁷

5.3.2 The right to dignity

The right to dignity grounds every child’s right to make autonomous decisions. Woolman proposes multiple conceptions of human dignity which require society and the state to respect every person’s right to determine what should be done to their bodies. The first form of dignity (Dignity I) characterises an individual as an end in him- or herself, respects the inherent worthy of every person and emphasises that no one should be treated as a means to the end of others.²⁰⁸

personal autonomy, whereby the right to privacy must include the right to make the most intimate decisions regarding marriage and sexuality free from state interference’; S Fried ‘Sexuality and human rights’ (2004) 7(2) *Health and Human Rights* 273; K Scheiwe ‘Between autonomy and dependency: Minors’ rights to decide on matters of sexuality, reproduction, marriage, and parenthood: Problems and the state of debate – an introduction’ (2004) 18(3) *International Journal of Law, Policy and the Family* 262, 262-63.

²⁰³ 2014 (2) SA 168 (CC).

²⁰⁴ Para 60. See also para 63 of the same case.

²⁰⁵ Paras 60 and 63.

²⁰⁶ *In Eisenstadt v Baird* 405 US 438, 453 (1972), the United States Supreme Court held that ‘[i]f the right of privacy of the individual means anything it means the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child’.

²⁰⁷ See *Carey v Population Servs Intl* 431 US 678 (1977) at 693 and *Bellotti v Baird* 443 US 622 (1979) at 643-44. See also *Planned Parenthood of Central Missouri v Danforth* 428 US 52 (1976) at 71-75, where the Court held that ‘the state [can] not constitutionally give parents a blanket veto authority over their children’s abortion decision; and any independent parental interest in the abortion decision [is] not weightier than the privacy rights of a minor older enough to become pregnant’.

²⁰⁸ S Woolman ‘Dignity’ Woolman, Roux, Klaaren, Stein and Chaskalson (note 174 above) 36-1, 36-7–36-9. See also O Selatter ‘Human dignity as a normative concept’ (1983) 77(4) *American Journal of International Law* 848,

Dignity I revolves around the notion of bodily integrity and permits everyone to use their bodies in a way they see fit.²⁰⁹ Dignity II focuses on the need to treat others with ‘equal respect and equal concern’. It creates a ‘negative obligation not to treat another merely as a means and to recognise in that other the ability to act as an autonomous moral agent’.²¹⁰ Dignity II is closely linked to the right to equality in that it seeks to prevent unfair discrimination and to promote equal treatment of all people before the law.²¹¹ Woolman characterises self-actualisation as a form of dignity (Dignity III) in terms of which ‘[a]n individual’s capacity to create meaning generates an entitlement to respect for the unique set of ends that the individual pursues’.²¹² Dignity III underlies every individual’s autonomy to create value for themselves and justifies children’s claims to be permitted to develop or realise their potential fully.

The different forms of dignity referred to above ground reproductive autonomy and entitle women to terminate their pregnancies subject to limited restrictions.²¹³ According to O’Sullivan, ‘[d]enying a woman the freedom to make and to act upon decisions concerning reproduction treats her as a means to an end and strips her of her dignity’.²¹⁴ However, the right to reproductive freedom is not absolute as abortion threatens the intrinsic values of life and dignity. These values act as restraints on laws permitting access to abortion, at least from the point of foetal viability.²¹⁵ Human dignity also empowers children to make decisions on whether or not to accept certain forms of medical treatment and surgical operations. This reasoning arises from

849 and A Wood ‘Humanity as an end in itself’ in P Guyer (ed) *Critical essays on Kant’s Groundwork of the Metaphysics of Morals* (1999) 165, 180.

²⁰⁹ Woolman (note 208 above) 36-34, fn 6.

²¹⁰ Ibid, 36-10.

²¹¹ For inspiration on this point, Woolman refers to *President of the Republic of South Africa v Hugo* 1997 (4) SA (1) (CC) para 41, where the Court held that ‘the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal respect regardless of their membership in particular groups’.

²¹² Woolman (note 208 above) 36-11.

²¹³ See *Teddy Bear Clinic* case, para 64 and *R v Morgenthaler* (1998) 44 DLR (4th) 385, 491, where Wilson J held that ‘[t]he right to reproduce or not to reproduce...is properly perceived as an integral part of modern women’s struggle to assert her dignity and worth as a human being’.

²¹⁴ M O’Sullivan ‘Reproductive rights’ in S Woolman, T Roux, J Klaaren, A Stein and M Chaskalson (eds) *Constitutional Law of South Africa* 2 ed OS (2005) 37-1, 37-23.

²¹⁵ See D Meyerson ‘Abortion: The Constitutional Issues’ (1999) 116 *South African Law Journal* 50, 57, who uses the value of dignity to justify legal restrictions on access to abortion, and T Naude ‘The value of life: A note on *Christian Lawyers Association of SA v Minister of Health*’ (1999) *South African Journal on Human Rights* 541, 557-58

a particular conception of dignity (Dignity 1) which portrays children as ends who are entitled to make decisions concerning their bodies.

5.3.3 The right of access to health-related information

Section 32(1)(a) of the Constitution confers on everyone the right of access to information held by the state. This includes information held by state-owned hospitals. Section 32(1)(b) provides that everyone, including children, have the right to information held by another person, including private health care providers, provided that such information is required for the exercise or protection of any rights. National legislation may be enacted to give effect to the right of access to information.²¹⁶ In the context of access to health-related information, the right of access to information is protected in the National Health Act (NHA)²¹⁷ and the Children's Act. The NHA binds health care providers to inform the user 'in a language that the user understands and in a manner that takes into account the user's level of literacy'.²¹⁸ The relevant information should explain the nature, potential risks, benefits and consequences of the proposed treatment or surgery.²¹⁹ This includes information about alternatives to the proposed intervention, the range of diagnostic procedures and information on how the child would fare if he or she were not to take treatment or undergo surgery.

The NHA spells out specific guidelines concerning the nature of information to be given to users to enable them to give informed consent to such clinical procedures as medical treatment, contraception and abortion. It provides that health care providers have an obligation to inform users of (a) their health status, except where it would be against the best interests of the user; (b) the range of diagnostic procedures and treatment options available to the user; (c) the benefits, risks, costs and consequences generally associated with each option; and (d) the user's right to refuse health services, including an explanation of the implications, risks and obligations of such refusal.²²⁰ Further, section 13 of the Children's Act provides that every child has the right to have

²¹⁶ Section 31(2) of the Constitution.

²¹⁷ 61 of 2003.

²¹⁸ Section 6(2) of the NHA. See also *Castell v De Greef* at 425 and *Christian Lawyers Association II* para 21.

²¹⁹ See generally *Richter and Another v Estate Hammann* 1976 (3) SA 226 (C) at 232.

²²⁰ Section 6(1) of the NHA.

information relating to treatment, sexuality and reproduction; to their own health status; and to causes and treatment of their health status.²²¹

The statutory provisions cited above provide guidelines on the sort of information children need in order to make informed medical or reproductive decisions. They emphasise the importance of disclosure of health-related information to the full enjoyment of health care rights. Read together with the child's right to freedom of expression, particularly the 'freedom to receive or impart information or ideas',²²² the right of access to information requires parents and the state to refrain from interfering with the child's access to health-related information.²²³ Access to information is a precursor not only to the child's right to freedom of expression, but also to the child's right to make rational decisions, particularly in the context of adolescents' access to information concerning their (reproductive) health.²²⁴ Without access to adequate information, children may not make informed choices in the context of access to health care services.²²⁵

The NHA and the Children's Act emphasise the link between access to information and the ability of patients, including children, to make medical or reproductive decisions that promote their best interests and enhance their health, life, survival and development. Denying children access to health-related information bars them from making informed reproductive or medical choices. Lack of access to information restricts the control that children have over their bodies. At common law, the duty to disclose all relevant information historically formed part of the informed consent process and required medical practitioners to disclose all the material risks associated with the treatment or surgery.²²⁶ This duty arose from the fact many patients are

²²¹ Section 13(1) provides that '[e]very child has the right to

- (a) have access to information on health promotion and the prevention and treatment of ill-health and disease, sexuality and reproduction;
- (b) have access to information regarding his or her health status;
- (c) have access to information regarding the causes and treatment of his or her health status; and
- (d) confidentiality regarding his or her health status, except when maintaining such confidentiality is not in the best interests of the child'.

²²² Section 16(1) of the Constitution provides that '[e]veryone has the right to freedom of expression, which includes the freedom to receive or impart information or ideas.

²²³ Section 5.3.3 of Chapter Three.

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ See P Carstens 'Informed consent in South African medical law with reference to legislative development' available at <http://new.samls.co.za/node/410> (accessed 5 May 2014), who observes as follows:

laypersons in the field of medicine and doctors have the peremptory duty to disclose relevant information to all patients to enable them to make informed medical choices.

5.3.4 The rights to freedom (and security) of the person and reproductive health

The right to freedom and security of the person (particularly the sub-right to bodily integrity) grounds children's autonomy in using their bodies. Section 12(2) of the Constitution stipulates that 'everyone has the right to bodily and psychological integrity. This right includes everyone's sub-rights 'to make decisions concerning reproduction; to security in and control over their body; and not to be subjected to medical or scientific experiments without their informed consent'.²²⁷ It follows that everyone, including every child, has the right to security in and control over their body.²²⁸ This right empowers adults and children, especially adolescents, to make decisions about whether, and if so, how to use their bodies.²²⁹ Generally, every rational person is entitled to

In this way, adequate information becomes a requisite of knowledge and appreciation, and therefore, also of informed consent. In the absence of information, real consent will be lacking. In turn, this means that the doctor, as an expert, is saddled with a legal duty to provide the patient with the necessary information to ensure knowledge and appreciation, and yet, real consent on the patient's part. The doctor's duty of disclosure is not treated as one of negligence, arising from a breach of care, but as one of consent in the contractual sense.

See also J Burchell 'Informed consent – Variations on a familiar theme' (1986) 5(4) *Medicine and the Law* 293; D Giesen 'From paternalism to self-determination to shared decision-making' (1988) *Acta Juridica* 107-27; P Reilly 'Communicating with patients: Improving communication, satisfaction and compliance' (1989) 39 (321) *The Journal of the Royal College of General Practitioners* 177, 210; F Van Oosten 'Castell v De Greef and the doctrine of informed consent: Medical paternalism ousted in favour of patient autonomy' (1995) 28(1) *De Jure* 164, 166; WR Du Preez *Medical treatment of children and the Children's Act 38 of 2005*, Dissertation submitted in partial fulfilment of the requirements of the LLM degree at the University of Pretoria (2011) 11, where the author states that if the patient is a child, the medical practitioner should put special focus on plain language and avoid concealing pertinent information in medical jargon. For comparative jurisprudence, see *Canterbury v Spencer* 464 F 2d 772 (DC Cir 1972), where the Court held that '[t]he patient's right of self-decision shapes the boundaries of the duty to reveal. The right can be effectively exercised only if the patient possesses enough information to make an intelligent choice. The scope of the physician's communication to the patient, then, must be measured by the patient's need and that need is the information material to the decision'; *Brownfield v Daniel Daniel Freeman Marina Hospital* 208 Cal App 3d 405, 412-414 (1989) at 8, where the Court held that the duty to disclose information about reproductive health arises from every adult person's 'right, in the exercise of control over [her] own body, to determine whether to submit to lawful medical treatment. Meaningful exercise of this right is possible only to the extent that patients are provided with adequate information upon which to base an intelligent decision with regard to the information available'.

²²⁷ Section 12(2)(a)-(c) of the Constitution.

²²⁸ Section 12 of the Constitution.

²²⁹ In the American case of *Schloendorff v Society of the New York Hosp* 211 NY 125, 129-30 105 NE 92, 93 (1914), Cardozo J observed that '[e]very human being of adult years and sound mind has a right to determine what shall be done with his or her own'. In South Africa, this reasoning is likely to apply to mature minors since autonomy-related rights belong to 'everyone'.

decide what is or is not done to his or her body. Thus, section 12(2) of the Constitution enshrines the right to bodily self-determination and protects an individual's physical integrity against infringement from private persons and public functionaries.²³⁰

Attached to the concept of bodily self-determination is the idea that all forms of coercive contact with the physical person of another, including that of a child, is unlawful and violates his or her bodily integrity. Further, the phrase 'psychological integrity' suggests that even if the unauthorised 'touching' of another person were to benefit the person 'touched' and to result in little or no physical injury to him or her, it would still be unlawful. This is because such 'touching' may result in trauma and thus violates an individual's 'psychological integrity'. Preserving every child's physical and psychological integrity is part of acknowledging their separate personhood and identity.²³¹ The right to bodily and psychological integrity has implications for the balance between child participation, parental responsibility and state intervention in the context of health care decision-making. Thus, the right to security in and control over one's body directly grounds every child's right to bodily self-determination.

More importantly, the right to bodily integrity also includes everyone's 'right to make decisions concerning reproduction'.²³² This provision should be read with the command, enshrined in section 27(1)(a) of the Constitution, that everyone has the right to health care services, including reproductive health care. The fact that health care is a right to which every child is entitled raises questions about the reach of parental direction and guidance on matters related to medical treatment, surgical operations, sexuality and reproduction. While matters of choice and sexual autonomy depend on the child's capacity to make informed decisions, it is commonly accepted that section 12(2) protects children's bodily self-determination and reproductive autonomy, including matters relating to 'whether or when to have children (including whether or not to terminate a pregnancy)'.²³³ In constitutional terms, the rights to 'security in and control over'

²³⁰ See I Currie and J De Waal *The Bill of Rights Handbook* 5 ed (2005) 291, 293.

²³¹ See M Freeman 'Child abuse: The search for a solution' in M Freeman (ed) *Overcoming child abuse: A window on a world problem* (2000) 1, 9, who argues that 'we must accept that children are not property ... but individuals whose physical, sexual and psychological integrity is as important as – indeed more important than – that of the adult population'.

²³² Section 12(2)(a) of the Constitution.

²³³ S Coetzee 'Pregnant minors' sexual rights: A constitutional perspective' (2012) 27 *Southern African Public Law* 487, 493.

one's body and 'to make decisions concerning reproduction' lie at the heart children's right to request the termination of pregnancy.²³⁴ In *Christian Lawyers Association of South Africa v Minister of Health*, the Court held that the '[t]he Constitution recognises and protects the right to termination of pregnancy or abortion in two ways, firstly under section 12(2)(a), that is, the right to bodily and psychological integrity which includes the right to make decisions concerning reproduction, and secondly, under section 12(2)(b), that is, the right to control over one's body'.²³⁵ Later in the judgment, the Court would make the following declaration:

The specific provisions of section 12(2)(a) and (b) of our Constitution guarantee the right of every woman to determine the fate of her pregnancy. The Constitution...affords "everyone" the right to bodily integrity including the right "to make decisions concerning reproduction" and "to security in and control over their body". This is quite clearly the right to choose whether to have her pregnancy terminated or not, for short, the right to termination of pregnancy....Cumulatively therefore the more explicit rights in section 12(2)(a) and (b) and all the other reinforcing rights provide a strong constitutional base for the right to termination of pregnancy in our law.²³⁶

The rights to 'control over' one's body and 'to make decisions concerning reproduction' are constitutive elements of bodily self-determination and permit minors to make autonomous reproductive decisions. The rights to make decisions concerning reproduction and to reproductive health care entitle adolescents to practice safe sexual relations, to be provided with

²³⁴ See, for example, R Dworkin *Life's dominion: An argument about abortion, euthanasia and individual freedom* (1993) 106-07, where the author argues:

Laws that prohibit abortion or make it difficult or expensive to procure one, deprive pregnant women of a freedom or opportunity that is crucial to many of them. A woman who is forced to bear a child she does not want because she cannot have an early and safe abortion, is no longer in charge of her own body: the law has imposed a kind of slavery on her. . . Adoption even when it is available, does not remove the injury, for many women would suffer great emotional pain for many years if they turned a child over to others to raise and love... But once one accepts (the dictum of Brennan I quoted above) as good law, then it follows that women do have a constitutional right to privacy that in principle includes the decision not only whether to beget children, but whether to bear them.

²³⁵ Paras 27-28. See also C Ngweni 'An appraisal of abortion laws in Southern Africa from a reproductive health rights perspective' (2004) 32(4) *Journal of Law Medicine and Ethics* 708, 715, who observes that these constitutional provisions provide for the right to choose to have an abortion and impose on the government the duty to provide abortion services.

²³⁶ Paras 51-52. See also para 54 of the same case where the Court held that '[o]ur Constitution protects the right of a woman to determine the fate of her own pregnancy. It follows that the State may not unduly interfere with a woman's right to choose whether or not to undergo an abortion'.

the conditions necessary for optimal foetal survival and development,²³⁷ and to maintain their reproductive health by having access to safe abortion services.²³⁸ Given that unwanted pregnancies and sexually transmitted diseases threaten the child's life, survival and intellectual development (particularly by forcing the child to drop out of school), the rights to control over one's body and to make decisions on reproduction, play an important role in promoting reproductive autonomy and the protection of children from the dangers associated with risky sexual practices.

5.3.5 Interim conclusion

The cumulative effect of the rights to privacy, dignity, bodily integrity and reproductive health are to broaden child autonomy and to limit forms of parental supervision that are inconsistent with the child's protection rights, developing maturity and best interests. Autonomy rights also limit state intervention with the child's decisions. However, all autonomy rights may be limited if they are exercised in a way that threatens the child's best interests or basic right to life. In terms of section 36 of the Constitution, all rights in the Bill of Rights may be limited by a law of general application provided that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Limitations of the child's autonomy rights are justifiable and reasonable when such rights are exercised in a way that disregards the child's best interests and threatens the child's basic right to life, survival and development.²³⁹ Most of the autonomy rights entrenched in the Constitution may be enjoyed by competent persons and may be limited in respect of children who lack capacities for rational action. Below is an exploration of the meaning and scope of parental responsibility in South Africa, its relationship with children's autonomy-related rights and state intervention in decision-making.

²³⁷ Section 27(2) provides that '[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of' the right to reproductive health.

²³⁸ See generally R Cook 'Human rights and reproductive self-determination' (1995) 44 *American University Law Review* 975, 1002.

²³⁹ Parents and the state have the duty to interfere with the child's autonomy and to guide the child to enjoy her privacy in an appropriate way.

6 PARENTAL RESPONSIBILITIES AND RIGHTS

Thus far, it has been shown that South African law protects the child's provision, protection and participation rights in almost the same way international law guarantees these rights. The chapter has also demonstrated that the Constitution entrenches autonomy-related rights which expand children's right to make independent decisions. However, these autonomy rights can be limited from two strands: first, by the parental responsibility to protect or guide the child and, second, by the state's protective powers as *parens patriae* of all children within its territorial borders. In constitutional terms, the child's right to parental care implies that children are entitled to parental protection from dangers that arise when they are abandoned to their autonomy rights. This view has been confirmed by South African courts²⁴⁰ and academic authorities.²⁴¹

A holistic understanding of children's participation and autonomy rights should include an analysis of the relationship between these rights and the responsibilities of parents, guardians or caregivers. Given that children's rights should be read together with parental responsibility, it is important to examine the implications of parental responsibility for the autonomy rights of children. Further, the state is legally bound to evaluate whether children and parents exercise their rights in a manner consistent with the child's best interests. Thus, this section examines the relationship between children's rights, parental responsibility and state intervention at the domestic level. By way of background, it starts with the scope of parental responsibility under the common law and proceeds to deal with the child's constitutional right to parental care.

²⁴⁰ See generally *S v M* para 34.

²⁴¹ See A Skelton 'Children' in Currie and De Waal (note 57 above) 598, 601-02, observing that 'parents are generally permitted to direct the secular or religious guidance of young children...However, as children grow older and their own rights of religious freedom mature, parents' rights diminish'; E Bonthuys and M Pieterse 'Divorced parents and the religious instruction of their children' (2001) 118 *South African Law Journal* 216, 222-24 and Bekink and Brand (note 113 above) 169, 181, make the following observations:

The interest of children in maintaining their autonomy must be seen in the context of the relationship of dependence that of necessity exists between child and parent. The responsibilities of care and support a parent has toward a child, and the rights and powers a parent can exercise toward a child in order to meet those responsibilities, limit the extent to which a child can lay claim to...self-determination...If these rights are limited by the exercise of parental authority, this limitation can be justified by a parent's duty of care and support for the child.

6.1 Parental authority under the common law

What we now term parental responsibility was, at common law, known as parental authority. Parental authority was defined as ‘the complex of rights, powers, duties and responsibilities vested in or imposed upon parents’, by virtue of their parenthood, in respect of their minor child and his or her property’.²⁴² It consisted mainly of two distinct common law concepts, namely guardianship and custody.²⁴³ Guardianship concerns the power to make decisions about the child’s juristic acts and property, and custody generally refers to the power to make such day-to-day decisions as the child’s school and type of education (whether religious or secular), the child’s place of residence and matters relating to religion.²⁴⁴ Custody involves guiding the child; taking decisions on matters relating to the child’s choice of associates;²⁴⁵ education,²⁴⁶ health care and medical treatment,²⁴⁷ safety, religious upbringing²⁴⁸ and general welfare.²⁴⁹ Since the early years of the 20th Century,²⁵⁰ it has been generally accepted that parents have the right and powers to regulate the daily lives of their biological children.²⁵¹ Non-custodial parents who had

²⁴² Van Heerden (note 3 above) 313. See also DSP Cronje and J Heaton *South African family law* 2 ed (2004) 265 and FJ Bosman and GJ Van Zyl ‘Children, young persons and their parents’ in Robinson (note 46 above) 49, 52.

²⁴³ See South African Law Commission *Report on the Investigation into the Advancement of the Age of Majority* (Project 43, 1985) para 9.1, where it is stated that ‘in addition to the supplementing of the minor’s limited contractual capacity and capacity to litigate, parental power also entails control and custody of the minor and the administration of his property’.

²⁴⁴ See *V v V* at 176G. See also AH Barnard, DSP Cronje and PJJ Olivier *The South African law of persons and family law* 3 ed (1986) and DSP Cronje and J Heaton *The South African law of persons* 3 ed (2008) 277-79.

²⁴⁵ *Meyer v Van Niekerk* 1976 (1) SA 252 (T) and *Coetzee v Meintjies* 1976 (1) SA 257 (T) at 262B.

²⁴⁶ See *Richter v Richter* 1947 (3) SA 86 (W) at 90; *Matthee v MacGregor* 1981 (4) SA 637 (Z) at 640D-F; *Van Oudenhove v Gruber* 1981 (4) SA 857 (A) at 867F-G, where the Appellate Division (now the Supreme Court of Appeal) held that a custodial parent ‘has the right to have the children with her, to control their lives, to decide all questions of education, training and religious upbringing’; *W v S* 1988 (1) SA 475 (N) 495F-G; and *Mentz v Simpson* 1990 (4) SA 455 (A) at 459D-F.

²⁴⁷ *Oosthuizen v Rix* 1948 (2) PH B65 (W); *Kustner v Hughes* 1970 (3) 622 (W); and *Ben-Yishai v Ben-Yishai* 1976 (2) SA 307 (W).

²⁴⁸ See *Dreyer v Lyte-Mason* 1948 (2) SA 245 (W) at 251; *Ryan v Ryan* 1963 (2) PH B26 (SR); *Nugent v Nugent* 1978 (2) SA 690 (R) at 692F-693D; *Matthee v MacGregor* at 640D-F; *Van Oudenhove v Gruber* 1981 (4) SA 857 (A) at 867F-G; *Dunscombe v Willies* 1982 (3) SA 311 (D) at 315E-H; *W v S* 1988 (1) SA 475 N at 495F-G and *S v L* (1992) (3) SA 713 at 721H-I. See also PJ Visser and JM Potgieter *Introduction to family law* 2 ed (1998) 206.

²⁴⁹ Cronje and Heaton (note 242 above) 280.

²⁵⁰ See *Mitchell v Mitchell* 1904 TS 128 at 130.

²⁵¹ See *Simleit v Cunliffe* 1940 TPD 67 at 75-76, where Solomon J held that awarding custody to a parent ‘entrusts to [him or] her all that is meant by the nurture and upbringing of the minor children. In this is included all that makes up the ordinary, daily life of the child shelter, nourishment and the training of the mind....The child...passes into the home of the [father or] mother, and there it must find all that is necessary to its growth in mind and body’; *Vucinovich v Vucinovich* 1944 TPD 143 at 147; *Bloem v Vucinovich* 1946 AD 501 at 512; and *Desai v Engar and Engar* 1965 (4) SA 81 (W) at 82H. For academic authority on this position, see B van Heerden ‘Personal and proprietary aspects of the parental power’ in Heerden, Cockrell and Keightley (note 3 above) 657, 662; and E

contact with the child could also exercise these powers while visiting the child,²⁵² but were generally barred from interfering with the custodial parent's exercise of these powers unless the latter's actions were unreasonable.²⁵³

For purposes of this study, three points can be derived from the scope and limits of parental authority under the common law. First, the common law revolved around the rights and powers parents had to control the child without interference by others or the state. There was limited focus on the responsibilities attached to the office of parenthood and parents largely enjoyed the autonomy to direct their child's upbringing as they saw fit. Similarly, the rights of the child were not seriously considered in the decision-making process. The very emphasis on 'authority' and 'power' shows that the parent-child relationship was conceived from the point of view of the parent rather than the child.²⁵⁴

Second, the historical emphasis on parental autonomy meant that courts could barely intervene in the family unless the powers associated with parental authority were grossly abused.²⁵⁵ This hands-off-the-family approach to the parent-child relationship led the Appellate Division, in *Calitz v Calitz*,²⁵⁶ to hold that it could only alter existing custody arrangements based on the existence of 'special grounds' and that such grounds included, '*inter alia*, danger to the child's life, health or morals'.²⁵⁷ A court could not interfere with parental authority unless the parent's exercise of such authority was 'capricious or vitiated by unreason in the sense that no reasonable person should have arrived at it'.²⁵⁸ Subsequently, the state could not easily interfere with parental authority as the reasons for doing so had to be exceptionally compelling.

Bonthuys and T Mosikatsana 'Law of persons and family law' in *Annual Survey of South African Law* (2000) 128, 143.

²⁵² In *Allsop v McCann* 2001 (2) SA 707 (C), it was held that a father who had 'access' (now contact) to the child had the right to provide religious education to the child even if his (the father) religion was different from that of the mother.

²⁵³ *Simliet v Cunliffe* at 75-79.

²⁵⁴ See PJJ Olivier 'Minority and the parental power' (1983) *Acta Juridica* 97, 100.

²⁵⁵ See *Martin v Mason* 1949 1 PH B9 (N) 24, where Broome J held that 'unless good cause was shown, [the court] did not arrogate to itself functions which ought normally to be performed by one or other of the parents. The duty to care for the child devolved in the first instance upon the custodian parent, and it was only where that duty was not being properly performed that the court would interfere'. See also *Marais v Marais* 1960 (1) SA 844 (C) at 848; *Edge v Murray* 1962 (3) SA 603 at 606A; and *Du Preez v Du Preez* 1969 (3) SA 529 (D) at 532-33.

²⁵⁶ 1939 AD 56.

²⁵⁷ At 63.

²⁵⁸ See *Niemeyer v De Villiers* 1951 (4) SA 100 (T) at 106A-B, where the Court held that-

Third, the notion of parental authority gradually evolved and could be limited by the child's best interests and growing maturity. Courts began to emphasise that the child's life, health and morals did not constitute the sole grounds upon which they could interfere with parental authority.²⁵⁹ The best interests of the child provided a platform for state intervention within the family if parents were making decisions that were detrimental to children's interests.²⁶⁰ As shown above,²⁶¹ the common law gradually revolved around the best interests principle as the 'paramount consideration' in deciding matters affecting children. This change was influenced by the gradual departure from the notion of parental power (with its emphasis on parents' rights to control their children) to the notion of parental duties (with its focus on the rights of the child).²⁶² Relations between the parent and the child were construed as falling squarely within the scope of an office of trusteeship in terms of which powers were redefined as fiduciary duties to administer the child's estate for the benefit of the child.²⁶³ These developments meant that parental authority

the court has no jurisdiction to interfere with an exercise of discretion in a matter of this kind by a custodian parent unless the foundation has first been laid by proof to the satisfaction of the court that this has been an abuse by the custodian parent of his power; either that no discretion has been exercised at all, that is to say, that the actual decision has been capricious or vitiated by unreason in the sense that no reasonable person should have arrived at it or that the decision was inspired by a motive which was quite foreign to a due and proper regard for the interests of the children.

²⁵⁹ See, for example, *Van der Westhuizen v Van Wyk* 1952 (2) SA 119 (GW) at 120H and *Short v Naisby* 1955 (3) SA 572 (D) at 575A-C.

²⁶⁰ *Horsford v De Jager* (1959) (2) SA 152 (N) at 154C-D, where the court held that in interfering with parental authority, 'the question' to be answered 'is whether the interests of the children demand that the [previous] order of the Court' should be varied. After recognising that the *Calitz* criteria of life, health and morals were not exhaustive, the court, in *September v Karriem* 1959 (3) SA 687 (C) (hereafter *September v Karriem*) at 689 A, E-H, applied the best interests principle as follows:

If the Court is of the opinion that it should interfere with the rights of the parents, because the interests of the child demand such interference, it should be at large to act in the manner best fitted to further such interests. This may mean that the child should be taken from the custody and control of one or other or both parents and be given to a stranger. It seems to me that the Court as upper guardian should be given as complete a picture of the child and its needs as possible. Nothing of relevance should be excluded. All these are matters of the greatest relevance which will assist the trial Court in its determination of what is in the best interests of the child.

See also *Ex parte van Dam* 1973 (2) SA 182 (W) (hereafter *Ex parte van Dam*) at 185D; *Petersen v Kruger* 1975 (4) SA 171 (C) at 174B and *Coetzee v Singh* 1996 (3) SA 153 (D) at 154B-H.

²⁶¹ See section 4.2 of Chapter Four.

²⁶² See B Van Heerden and B Clarke 'Parenthood in South African law – Equality and independence? Recent developments in the law relating to guardianship' (1995) 112 *South African Law Journal* 140, 141-42.

²⁶³ For a fuller discussion of the fiduciary or trust model of parent-child relations, see sections 3.1-3.3 of Chapter Two. See also *Lynch v Lynch* at 52C; *Landmann v Mienie* 1944 OPD 59 at 66; where Van den Heever AJP held that parental power had developed from 'perquisite into an altruistic duty', *Edwards v Edwards* 1960 (2) SA 523 (D) at

could no longer be exercised for the benefit of parents, but rather for the benefit and in the best interests of the child.²⁶⁴ Where parental authority had been exercised unreasonably, the High Court as upper guardian of all minors could override parental decisions that were detrimental to the best interests of the child. While the High Court's power to intervene as upper guardian of all minors has a long history,²⁶⁵ the grounds upon which the High Court could do so gradually became wide under the broad concept of the best interests of the child.²⁶⁶ The growing importance of the child's best interests meant that parents had to exercise authority mainly for the purpose of protecting children from themselves and from external harm.²⁶⁷

Finally, most of the cases discussed above demonstrate that the child's capacity to make personal decisions has, to a limited extent, always limited parental authority. In *Meyer v Van Niekerk*,²⁶⁸ the court observed that the parental power to direct the psychological and moral education of a child applies mainly to young children and diminishes progressively as the child matures, until it

524G, where Jansen J wrote about parental power as 'the privilege and responsibility of taking decisions in regard to the child'; *Hornby v Hornby* at 500A and *Pinion v Pinion* 1994 (2) SA 725 (D) at 729B-C.

²⁶⁴ For a line of cases on this point, see *Landmann v Mienie* at 61-66; *Hornby v Hornby* 1954 (1) SA 498 (O) at 500; *Lynch v Lynch* 1965 (2) SA 49 (R) at 52; *Meyer v Van Niekerk* at 255-57 and *Gordon v Barnard* at 890A-G, where Steyn J held that the legitimacy of parental authority depended on whether the bearer of such authority exercised it in a reasonable manner and that a court would not grant an interdict in support of a grossly unreasonable exercise of parental authority. See also Van Leeuwen *RHR* 1 13 1, 7; Voet 1 6 3. See also Lee and Honoré *Family, things and succession* HJ Erasmus, CG Van der Merwe and AH Van Vyck (eds) 2 ed (1983) 152, para 137, who argue that '[t]he parental power of modern law is, however, no longer a power to be exercised for the benefit of the parents, but rather a complex of duties and responsibilities to be carried out in the interest of the minor child'.

²⁶⁵ See *Van Rooyen v Werner* (1892) 9 SC 425, 428 and *Blume v Van Zyl and Farrell* 1945 CPD 48 at 50.

²⁶⁶ See *Weepner v Warren and Van Niekerk NO* 1948 (1) SA 898 (C) at 901; *Goodrich v Botha* 1952 (4) SA 175 (T); *Horsford v De Jager* 1959 (2) SA 152 (N) at 154B-C; *September v Karriem* at 688; *Ex parte Sakota* 1964 (3) SA 8 (W); *Ex parte Powrie* 1963 (1) SA 299 (W) at 303A-B; *Ex parte van Dam* 1973 (2) SA 182 (W) at 184H-185B; *Ex parte Kommissaris van Kindersorg, Krugersdorp: In re JB* 1973 (2) SA 699 (T) at 705-707C-D; *Wehmeyer v Nel* 1976 (4) SA 966 (W) at 969D; *Nugent v Nugent* 1978 (2) SA 690 (R) at 692; *Abrahams v Abrahams* 1981 (3) SA 593 (B) at 597-99; *Seetal v Pravitha* 1983 (3) SA 827 (D); *M v R* (1989) (1) SA 416 (O); *O v O* 1992 (4) SA 137 (C) and *Ex parte Kedar* 1993 (1) SA 242 (W).

²⁶⁷ See JM Kruger *Judicial interference with parental authority: A comparative analysis of child protection measures*, A thesis submitted in terms of the requirements of the degree of Doctor Legum (2003) Chapter Three, para 7.4, who argued that:

parental authority in South African law should be seen as a measure that exists for the protection of the child. This measure of protection should be exercised in the interests of the protected person, namely the child. To enable the parent to exercise his or her authority and meet his or her obligation to protect the child, the parent has certain competences and is entitled to exercise certain rights, and has certain duties. It is important to keep in mind that these competences, rights and duties flow from the parent's obligation to protect the child and act in his or her best interests.

²⁶⁸ Note 241 above.

consists of nothing more than advice.²⁶⁹ In *Gordon v Barnard*,²⁷⁰ Steyn J was at pains to stress that ‘the right of a parent to exercise control over a child ‘is a dwindling right which the Courts will hesitate to enforce against the child the older he is. It starts with a right of control and ends with little more than advice’.²⁷¹ Thus, the child’s growing maturity allows children to make personal decisions that are in their best interests.²⁷² Today, parental authority and state intervention are broadly governed by the Constitution and the Children’s Act. These instruments largely codify common law principles and domesticate international human rights standards governing the parent-child relationship.

6.2 Parental responsibility under the Constitution and the Children’s Act

South African constitutional law recognises that children live within families that play an important role in the enjoyment by children of their rights.²⁷³ In this respect, the Children’s Act seeks ‘to promote the preservation and strengthening of families’ and ‘to strengthen and develop community structures which can assist in providing care and protection for children’.²⁷⁴ The importance of maintaining family relationships is underlined by the fact that even where a court finds that a child is in need of care and protection, the order/s it makes must be targeted at maintaining stability in the child’s upbringing. According to section 157 of the Children’s Act, this may require the participation of parents and children in family preservation or reunification programmes.²⁷⁵ The legal drive towards non-confrontational ways of promoting children’s rights

²⁶⁹ At 257A-D.

²⁷⁰ 1977 (1) SA 887 (C).

²⁷¹ At 889G-H. The court was following the English case of *Hewer v Bryant* [1969] 3 All ER 578 (CA).

²⁷² See *Gordon v Barnard* at 889H. See also PJ Visser and MJ Potgieter *Introduction to family law* 2 ed (1998) 199; and Lee and Honoré (note 260 above) par 137 and E Spiro *The law of Parent and child* (1971) 36.

²⁷³ The preamble of the Children’s Act provides that ‘it is neither desirable nor possible to protect children’s rights in isolation from their families and communities’.

²⁷⁴ Section 2(a) and (a) of the Children’s Act.

²⁷⁵ Section 157(1) provides that ‘[b]efore a children’s court makes an order in terms of section 156 for the removal of the child from the care of the child’s parent or care-giver, the court must-

- (a) obtain and consider a report by a designated social worker on the conditions of the child’s life, which must include-
 - (i) an assessment of the developmental, therapeutic and other needs of the child;
 - (ii) details of family preservation services that have been considered or attempted; and
 - (iii) a documented permanency plan taking into account the child’s age and developmental needs aimed at achieving stability in the child’s life and containing the prescribed particulars; and
- (b) consider the best way of securing stability in the child’s life, including whether such stability could be secured by-

is apparent in many other provisions, in the Children's Act, which provide for amicable ways of resolving family conflicts,²⁷⁶ envisage the participation of parents or families in decisions affecting children²⁷⁷ or seek to encourage joint decision-making between parents and children.²⁷⁸ Most of these provisions demonstrate that the child's autonomy or protection rights should be read together with the very child's right to adult guidance and parental care.

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- (i) leaving the child in the care of the parent or care-giver under the supervision of a designated social worker, provided that the child's safety and well-being must receive first priority;
 - (ii) placing the child in alternative care for a limited period to allow for the reunification of the child and the parent or care-giver with the assistance of a designated social worker;
 - (iii) placing the child in alternative care with or without terminating parental responsibilities and rights of the parent or care-giver;
 - (iv) making the child available for adoption;
 - (v) issuing instructions as to the evaluation of progress made with the implementation of the permanency plan at specified intervals.
- (2) A designated social worker facilitating the reunification of a child with the child's family in terms of subsection (1)(b)(ii) must-
- (a) investigate the causes why the child left the family home;
 - (b) address those causes and take precautionary action to prevent a recurrence; and
 - (c) provide counselling to both the child and the family before and after reunification.

(3) A very young child who has been orphaned or abandoned by its parents must be made available for adoption in the prescribed manner and within the prescribed period except when this is not in the best interests of the child.

²⁷⁶ Section 6(4) provides that 'in any matter concerning a child, an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided'; section 49(1) provides that a children's court may decide to order a lay forum hearing in an attempt to resolve family issues out of court; section 60(3) provides that '[c]hildren's court proceedings must be conducted in an informal manner and, as far as possible, in a relaxed and non-adversarial atmosphere which is conducive to attaining the co-operation of everyone involved in the proceedings'; section 69(1) permits the children's court before which a matter has been brought, to order the setting up of a pre-hearing conference to mediate between the parties, to settle matters between the parties to the extent possible and to identify the issues to be resolved by the court; section 70(1) empowers the children's court to 'cause a family group conference to be set up with the parties involved in a matter brought to or referred to a children's court, including any other family members of the child, in order to find solutions for any problem involving the child'; section 71(1) authorises the children's court to refer matters brought to it to 'any appropriate lay-forum, including a traditional authority, in an attempt to settle the matter by way of mediation out of court'; and section 71 envisages the settlement of family issues outside court and foresees instances in which the out-of-court agreements may be made orders of court.

²⁷⁷ See, for example, section 6(3) which provides that '[i]f it is in the best interests of the child, the child's family must be given the opportunity to express their views in any matter concerning the child'; and section 7(1)(b) provides that 'the attitude of the parents, or any specific parent, towards (i) the child and (ii) the exercise of parental responsibilities and rights in respect of the child' is one of the factors to be considered in determining whether a decision is in the best interests of the child;

²⁷⁸ Section 6(5) provides that '[a] child, having regard to his or her age, maturity and stage of development, and a person who has parental responsibilities and rights in respect of that child, where appropriate, must be informed of any action or decision taken in a matter concerning the child which significantly affects the child'; section 31 of the Children's Act encourages joint participation between the child to be affected by certain decisions and holders of parental responsibilities in respect of such child; section 42(8) provides that '[t]he children's court hearings must...be held in a room which is conducive to the informality of the proceedings and the active participation of all persons involved in the proceedings without compromising the prestige of the court'; and section 69(2) permits children, alongside other family members, to participate in pre-hearing conferences.

The Constitution does not entrench a right to family life as do several international human rights instruments. Courts have derived a right to family life from section 10 of the Constitution. In *Dawood v Minister of Home Affairs*,²⁷⁹ Van Heerden J held that the right to dignity protects the ‘core elements’ of the institutions of marriage and family life. In *Dawood v Minister of Home Affairs*,²⁸⁰ the Constitutional Court confirmed this finding and held that the right to dignity protects the rights of persons freely to marry and raise a family; that legislation preventing couples from establishing lasting marriages relationships ‘impairs the ability of the individual to achieve personal fulfilment’ and that such legislation infringes upon the right to dignity.²⁸¹

Apart from the right to dignity, section 28(1) of the Constitution provides that ‘every child has the right to family care or parental care or to appropriate alternative care when removed from the family environment’. ‘Parental care’, argues Gallinetti, refers to ‘the honour of being a parent, and the responsibility and the accountability that attaches to a parent in having to shape the life of his or her child’.²⁸² Section 30(1)(b) of the Interim Constitution merely provided for a right to ‘parental care’,²⁸³ but the 1996 Constitution adds ‘family care’, and distinguishes between these forms of care from alternative care.²⁸⁴ Alternative care includes temporary safe care, and the care provided by a person designated by the court to be the foster parent of the child or by a child and youth care centre.²⁸⁵ The term ‘parental care’ or ‘family care’ includes care provided by the extended family or any person responsible for the child.²⁸⁶ The inclusion of ‘family care’ was

²⁷⁹ 2000 (1) SA 997 (C).

²⁸⁰ See 2000 (3) SA 936 (CC).

²⁸¹ Paras 28 and 37.

²⁸² J Gallinetti ‘2kul2Btru: What children would say about the jurisprudence of Albie Sachs’ (2010) 25 *Southern African Public Law* 108, 117.

²⁸³ Parental care has been interpreted to embrace not only the care provided by biological parents, but that which is provided by adoptive parents, foster parents, step parents and relatives that play parental roles. See *SW v F* 1997 (1) SA 796; *Heystek v Heystek* 2002 (2) SA 754 at 757C-D and *J v Director General, Department of Home Affairs* 2003 (5) SA 605 (D). See also TL Mosikatsana ‘Law of persons and family law’ (1996) *Annual Survey of South African Law* 174, 174.

²⁸⁴ For a detailed discussion, see A Skelton ‘Kinship care and cash grants: In search of sustainable solutions for children living with members of their extended families in South Africa’ (2012) *International Survey of Family Law* 333-45.

²⁸⁵ See generally sections 46(1)(a) and 1(1) of the Children’s Act read together. According to section 1(1) of the Children’s Act, ‘temporary safe care, in relation to a child, means care of a child in an approved child and youth care centre, shelter or private home or any other place, where the child can safely be accommodated pending a decision or court order concerning the placement of the child, but excludes care of a child in a prison or police cell’.

²⁸⁶ See South African Law Reform Commission *Report on Access to Minor Children by Interested Persons* (Project 100, June 1996) in which the Law Commission proposed legislative changes that would enable members of the child’s extended family to seek access to the child through the courts. See also M Pieterse ‘In *loco parentis*: Third

meant to affirm the reality that South African families take various forms and to ensure that the state does not favour one family form over another.²⁸⁷ Thus, the relationship between children and holders of parental responsibilities is protected through a wide definition of family membership which focuses on caring relationships rather than biological ties.²⁸⁸

Section 28(1)(b) serves multiple functions. First, it implies that parents are the ones, ahead of all others, mainly responsible for providing the care and upbringing that their children need.²⁸⁹ In *Government of the Republic of South Africa v Grootboom and Others*,²⁹⁰ the Court confirmed that parents and families are the primary bearers of the responsibility to care for their children and that the state will only intervene to provide ‘alternative care’ if parental care is inadequate.²⁹¹ To provide adequate care, parents and families should be granted reasonable powers to direct children without unnecessary threats of state intervention.²⁹² The right to parental or family care indicates preference for care in the family environment and requires the state to respect the family institution (especially decisions made by parents) as the environment within which appropriate care may be provided.²⁹³ Nonetheless, the state has the obligation to ‘create the

party parenting rights in South Africa’ (2000) 11 *Stellenbosch Law Review* 324 and South African Law Commission *Review of the Child Care Act*, Discussion Paper 103 (2001) 191.

²⁸⁷ For an informative discussion on this omission, see *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa Act, 1996* 1996 (4) SA 744 (CC) para 99.

²⁸⁸ To recognise the diversity of family forms in this country, sections 23 and 24 of the Children’s Act now permit ‘any person having an interest in the care, well-being or development of a child...to apply for care’ and guardianship of the child. In *CM v NG* 2012 (4) SA 452 (C), these provisions were successfully invoked by a woman – who was not biologically related to the child – to have contact with and guardianship of a child born during a permanent life partnership between the applicant and the birth mother. The child had been conceived through artificial insemination using donor sperm. See also *SW v F* 1997 (1) SA 796 (O) at 799B-C, where the Court held that the child’s right to parental care did not prevent adoption ‘where the care of the natural parents was lacking or inadequate’.

²⁸⁹ See generally J Sloth-Nielsen ‘Children’ in H Cheadle, D Davis and N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2005) 23-24.

²⁹⁰ 2001 (1) SA 46 CC.

²⁹¹ Paras 77-79. See also *Jooste v Botha* (2000) (2) SA 199 (T) at 208D-G, where the Court, among other things, defined alternative care as the care usually provided by the state or other external agencies where the child is removed from the family environment.

²⁹² See *Patel v Minister of Home Affairs* 2000 (2) SA 343 (D), where the Court held that immigration laws and policies should prevent separation of parents from children to promote family life; *C v Department of Health and Social Development*, holding that the removal of a child from the family environment in the absence of a procedure for automatic review of the decision to remove the child is unconstitutional; and *Centre for Child Law v MEC for Education, Gauteng* 2008 (1) SA 223 (T) at 229B-C, observing that to remove children and put them in poor conditions of living is tantamount to betrayal and ‘we teach them that neither the law nor state institutions can be trusted to protect them’.

²⁹³ Bekink and Brand (note 113 above) 186.

necessary environment’ for parents and family members to provide children with appropriate care.²⁹⁴

Parents have the responsibility, as part of the child’s right to parental care, to guide and direct their children.²⁹⁵ In *S v M*, the Constitutional Court held that parents have the responsibility ‘to provide [children] with guidance on how to deal with setbacks and make difficult decisions. Children have a need and a right to learn from their primary caregivers that individuals make moral choices for which they can be held accountable’.²⁹⁶ Parents in turn have the autonomy to raise their children as they see fit, subject only to the oversight role of the state under *parens patriae* doctrine.²⁹⁷ Firmly protected in international human rights instruments,²⁹⁸ this traditional approach to family law has also been incorporated into the Children’s Act.

Parents and other holders of parental responsibilities have the right to agree on parenting plans determining the place where and person with who the child is to live; issues relating to the maintenance of the child; whether the child should have contact with the parties or any other person; and matters relating to the child’s education and religious upbringing.²⁹⁹ In its own terms, the Children’s Act seeks to, among other things, give effect to the child’s right to parental or family care or alternative care if removed from the family environment.³⁰⁰ Entrenched in section 18 of the Children’s Act, parental responsibilities and rights give flesh to this constitutional right.³⁰¹ Section 18(2) of the Children’s Act provides that ‘parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right (a) to care for the child; (b) to maintain contact with the child; (c) to act as guardian of the child; and

²⁹⁴ *Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae)* 2003 (2) SA 363 (CC) para 24.

²⁹⁵ See generally *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa Act, 1996* 1996 (4) SA 744 (CC) para 100, where the Constitutional Court held that ‘the provisions of the new [Constitution] clearly prohibit any arbitrary interference with the right to establish and raise a family’.

²⁹⁶ Para 34.

²⁹⁷ See *B v M* [2006] 9 BCLR 1034 (W) and *J v J* 2008 (6) SA 30 (C) paras 27 and 35, where the court held that ‘holders of parental responsibilities and rights enjoy a large measure of autonomy’ in performing their supervisory functions;

²⁹⁸ See sections 6.1 and 6.2 of Chapter Three.

²⁹⁹ Section 33(1)-(3) of the Children’s Act. See also section 22(1) of the Children’s Act which provides that any person with parental responsibilities and rights may enter into an agreement providing for the acquisition of such responsibilities and rights by ‘any other person having an interest in the care, well-being and development of the child’.

³⁰⁰ See section 2(1)(b)(i) of the Children’s Act.

³⁰¹ Sections 1(1) and 18 of the Children’s Act read together.

(d) to contribute to the maintenance of the child'.³⁰² Of these elements, only the concept of care is relevant to this study. In terms of section 1(1) of the Children's Act, care in respect of a child includes-

- (a) providing the child with (i) a suitable place to live; (ii) living conditions that are conducive to the child's health [and] well-being and development;
- (b) safeguarding and promoting the well-being of the child;
- (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
- (e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;
- (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
- (g) guiding the behaviour of the child in a humane manner;
- (h) maintaining a sound relationship with the child;
- (i) accommodating any special needs that the child may have; and
- (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child.³⁰³

These incidents of parental responsibilities and rights largely domesticate international standards and codify the elements of parental authority under South African common law.³⁰⁴ The parental duty to provide the child with the 'living conditions that are conducive to the child's health, well-being and development' echo the importance of the right to life, survival and development in deciding whether or not parental care is consistent with the best interests of the child. This is supported by rules, entrenched in section 1(1)(b)-(c) of the Children's Act, which require parents to safeguard the well being of the child and to protect the 'child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards'. These rights are protected under section 28 of the Constitution, hence the

³⁰² It should be recognised that the incidents of parental responsibilities and rights are not mentioned exhaustively under the Children's Act.

³⁰³ Section 1(1) of the Children's Act. For a comprehensive discussion of parental responsibility under the Children's Act, see C Himonga 'Children (minors)' in F Du Bois (ed) *Wille's principles of South African law* 9 ed (2009) 170, 208.

³⁰⁴ Ssee J Heaton and A Roos *Family and succession law in South Africa* (2012) 159-70.

command that parental care includes the responsibility ‘to respect, protect, promote and fulfil the rights set out in the Bill of Rights’.³⁰⁵

Section 1(1)(e) and (f) of the Children’s Act enables parents to protect and empower children in the context of decision-making on matters relating to culture, religion and education. Many other elements of ‘care’ also indicate that parents have the right, against the state and third parties, to make decisions on the child’s education, religion, place of residence and other day to day activities. Read with the child’s protection rights,³⁰⁶ these elements of ‘care’ show that parents have the primary duty to protect children from decisions and practices that endanger the child’s right to life, survival and development. Parents, under the definition of ‘care’, have the general duty to ensure that ‘the best interests of the child are the paramount concern in all matters affecting the child’.³⁰⁷ This provides room for parents and the state to rank children’s interests and to interfere with personal decisions, by the child, which are inconsistent with the child’s best interests.

That the scope of parental responsibility under the Children’s Act envisages an immense role for parents is also evident from section 7 of the Children’s Act. This provision codifies many common law presumptions that represent a strong inclination towards parental autonomy (from state control) in decision-making within the family. In determining what is best for the child, the courts should consider not only the attitude of the parent towards a child, but ‘the need for the child (i) to remain in the care of [their] parent, family and extended family; and (ii) to maintain a connection with [their] family, extended family, culture or tradition’.³⁰⁸ Regard must also be had to ‘the need for a child to be brought up within a stable family environment’.³⁰⁹ Although they are codified as children’s needs, these presumptions represent remnants of the parental power associated with the waning public-private dichotomy. They, too, potentially mask the rights of children beneath the veil of parental responsibility. This is not a surprising trend, given that

³⁰⁵ Section 1(1)(d) of the Children’s Act.

³⁰⁶ See sections 5.2 of Chapter Three and 5.1 of this chapter.

³⁰⁷ Section 1(1)(j) of the Constitution.

³⁰⁸ Section 7(1)(b) and (f) of the Children’s Act.

³⁰⁹ Section 7(1)(k) of the Children’s Act.

South Africa is coming from an age where parental rights were dominant.³¹⁰ Thus, courts are likely to uphold the parent's right to provide guidance if such guidance is exercised reasonably in the best interests of the child.³¹¹ To this end, all the relevant provisions are consistent both with the common law³¹² and international law.³¹³ Finally, the main duty of parents, holders of parental responsibilities and other persons who voluntarily care for the child is to protect the child and their rights. The state and courts have the duty to intervene whenever parents fail to perform this duty.

6.3 State intervention in the best interests of the child

Sections 28(1)(c)-(d) of the Constitution and 1(1) of the Children's Act enumerate the material elements of the duty implied by the child's right to parental care.³¹⁴ Where parents or guardians violate children's protection rights in contravention of section 28 of the Constitution³¹⁵ and multiple provisions of the Children's Act,³¹⁶ they invite the state into the family home and the state may provide appropriate alternative care for the child. This is emphasised by the fact that parental responsibility and care are explicitly defined to include the duty to protect children from maltreatment, neglect, abuse and violence.³¹⁷ Where the child has been removed from the care of abusive parents, the state should provide care which is of such a nature and quality that it will be equivalent to 'appropriate' family or parental care.³¹⁸

The constitutional and statutory protection of children's protection rights does not only provide guidance on what parents and the state are legally required to do, but authorises the state and local courts to override parental decisions that threaten such rights. For example, courts have the

³¹⁰ J Sinclair 'From parents' rights to child's rights' in CJ Davel (ed) *Children's rights in a transitional society* (1998) 62-78 and Davel and Jordaan (note 35 above) 55.

³¹¹ See *L v H* 1992 (2) SA 594 (E) at 598.

³¹² Section 6.1 above of this chapter.

³¹³ Section 6.1 of Chapter Three.

³¹⁴ These include the rights of children to basic nutrition, shelter, basic health care services and social services; and the right not to be subjected to maltreatment, neglect, abuse and degradation.

³¹⁵ See section 28(1)(d)-(f) of the Constitution.

³¹⁶ Sections 1(1) and 2(b)(iii) of the Children's Act. See also section 7(1)(l)(i) and (ii) of the Children's Act.

³¹⁷ Section 1(1)(c) of the Children's Act.

³¹⁸ Friedman, Pantazis and Skelton (note 178 above) 47-9, where the authors argue that section 28(1)(b) recognizes that when parental care is absent, 'such as where the child has been removed from the family environment, the state has a to provide alternative care'.

ultimate powers to determine whether a child involved in or affected by court proceedings is in need of care and protection.³¹⁹ Where ‘a children’s court finds that a child is in need of care and protection’, it has the power to ‘make any order which is in the best interests of the child’.³²⁰ In terms of the Children’s Act, there are many other instances in which the state and courts are allowed to override parental decisions that are inconsistent with the best interests of the child.³²¹

Courts have wide powers to make various orders to enhance the protection of children’s rights. These orders include those preventing any ‘person from maltreating, abusing, neglecting or degrading the child or from having any contact with the child, if the court finds that (i) the child has been or is being maltreated, abused, neglected or degraded by that person; (ii) the relationship between the child and that person is detrimental to the well-being or safety of the child; or (iii) the child is exposed to a substantial risk of imminent harm’.³²² Section 45(4) of the Children’s Act provides that ‘[n]othing in this Act shall be construed as limiting the inherent jurisdiction of the High Court as upper guardian of all children’. This inherent jurisdiction enables the High Court to perform its traditional protective role and to balance children’s rights

³¹⁹ See sections 29(7) and 155 of the Children’s Act.

³²⁰ Section 156(1) of the Children’s Act.

³²¹ Section 18(4) and (5) provides that the exercise of powers relating to guardianship is subject to the intervention of a competent court; section 21(3)(b) stipulates that family mediation on whether a biological father of a child (who does not have parental responsibilities and rights) has consented to be identified as a father or paid damages under customary law or contributed in good faith towards the upbringing or maintenance of the child for a reasonable period, may be reviewed by a court; section 22(4)(b) provides that a parental responsibilities and rights agreement only obtains the force of law only if it is ‘made an order of the High Court, a divorce court in a divorce matter or the children’s court on application by the parties to the agreement’; section 22(7) stipulates that ‘[o]nly the High Court may confirm, amend or terminate a parental responsibilities and rights agreement that relates to the guardianship of a child’; section 23(1) states that only the High Court, a divorce court in divorce matters or a children’s court may entertain applications for care and contact by persons interested in the care, well-being or development of a child. In deciding whether to approve such an application, the relevant court should have regard to the best interests of the child (section 23(2)). In terms of section 24(1) and (2), courts may entertain applications for guardianship by persons interested in the care, well-being and development of a child and the court must determine whether the application is in the best interests of the child; section 26(1) allows a person claiming paternity of the child to apply for an order confirming such paternity if the biological mother of the child refuses to recognise such person as the father of the child; section 28(1) grants the High Court, a divorce court in divorce matters or a children’s court the power to terminate, extend, suspend or restrict all or any parental responsibilities and rights any person has in respect of a child; section 32(3) provides that ‘[a] court may limit or restrict the parental responsibilities and rights which a person may exercise in terms of subsection (2)’; section 45 confers on the children’s court and the High Court the power to adjudicate matters relating to almost all elements of parental responsibility; section 129(7)-(9) empowers the Minister of Social Development and the courts to override parents’ or children’s unreasonable refusal of medical treatment and surgical operations; and section 150(1) defines children who are subjected to abusive parental care are in need of care and protection. There are many other provisions, in the Children’s Act, authorising the courts to override parental decisions that are not in the best interests of the child.

³²² Section 156(1)(k) of the Children’s Act.

and parental responsibility. It entails the High Court's power to assist minors during litigation,³²³ to interfere with the decisions of a particular parent in respect of the child, to override unreasonable parental decisions and to grant an appropriate order.³²⁴

The Children's Act recognises that parents sometimes fail to provide the protection children need and, instead, perpetrate the very harmful practices that they should protect children from.³²⁵ The reality that harmful practices may be perpetrated by those, such as parents, entrusted with the protection, care and education of children is also evident from the factors to be considered in deciding what is in the best interests of the child. Some of the relevant factors include the capacity of the parents to provide for the emotional and intellectual needs of the child,³²⁶ the child's physical or emotional security,³²⁷ the child's need to grow up 'in an environment resembling as closely as possible a caring family environment' where it is not possible for the child to 'be brought up in a stable family environment',³²⁸ 'the need to protect the child from physical or psychological harm',³²⁹ and whether there has been 'any family violence involving the child or a family member of the child'.³³⁰ On the whole, these elements require the state to override parental decisions that are not in the best interests of the child and to remove children from the care of abusive parents or guardians. Once the state determines that there has been a

³²³ See *Bethell v Bland* (1996) (2) SA 194 (W); *Vista University, Bloemfontein Campus v Student Representative Council, Vista University* 1998 (4) SA 102 (O); *Narodien v Andrews* 2002 (3) SA 500 (C) at 506F; *P v P* 2002 (6) SA 105 (N) and *Hay v B* 2003 (3) SA 492 (W).

³²⁴ See generally *Seetal v Pravitha* at 862C-863A and 864A-B; *M v R* at 420D-421G; *O v O* at 139H-I and *S v L* at 720I and 721E-J.

³²⁵ See for, example, section 150(1) which provides that '[a] child is in need of care and protection if, the child (a) has been abandoned or orphaned; has been exploited or lives in circumstances that expose the child to exploitation; lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being; *may be at risk if returned to the custody of the parent, guardian or care-giver of the child* as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child; is in a state of physical or mental neglect; or is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is'; and section 236(1) which provides that the consent of the parent or guardian to the adoption of a child is not necessary if the parent or guardian has abandoned the child; has abused or deliberately neglected or allowed the child to be abused or neglected; has consistently failed to perform his or her responsibilities in respect of the child for the past 12 months.

³²⁶ Section 7(1)(c) of the Children's Act.

³²⁷ Section 7(1)(h).

³²⁸ Section 7(1)(k).

³²⁹ Section 7(1)(l)(i) of the Children's Act.

³³⁰ Section 7(1)(m) of the Children's Act.

gross violation of the child's protection rights (discussed in detail above),³³¹ it is entitled to intervene in the family to preserve the child's life, survival and development.

Finally, answers on how the state is to regulate the parent-child relationship and to intervene in the child's best interests can be found in the terms 'parental care' and 'parental responsibility'. Parental care is a child's constitutional right and not an embodiment of any parental 'interest' divorced from the duty to promote children's rights. The term 'parental responsibility' is a functional concept in terms of which parents or guardians exercise guidance and discretion in order to enhance children's capacity to exercise their rights responsibly.³³² Thus, whatever rights parents have against third parties and the state, such rights should serve to ensure that children adequately enjoy their rights. In *V v V*,³³³ Foxcroft J captured this modern shift from parental power to parental responsibility in the following words:

There is no doubt that over the last number of years the emphasis in thinking in regard to questions of relationships between parents and their children has shifted from a concept of parental power to one of parental responsibility and children's rights. Children's rights are no longer confined to the common law, but also find expression in s 28 of the Constitution, not to mention a wide range of international conventions.³³⁴

The concept of parental responsibility signifies the erosion of the notion of parental authority and places focus on the duties created by children's rights.³³⁵ It exists for the purpose of protecting the child and empowers parents to make decisions that are consistent with children's rights. Whilst parental authority emphasises the parent's power to control children's lives, parental responsibility stresses the parents' duty to provide appropriate direction and guidance in the

³³¹ Section 5.1 of this chapter.

³³² See, for example, Lord Scarman in *Gillick v West Norfolk* [1986] 1 AC (HL) 112, 184, noting that 'parental rights are derived from parental duty and exist only in so long as they are needed for the protection of the person and property of the child'; J Eekelaar 'The emergence of children's rights' (1986) 6 *Oxford Journal of Legal Studies* 161; J Eekelaar 'The eclipse of parental rights' (1986) 102 *Law Quarterly Review* 4; BB Woodhouse 'A public role in the private family: The Parental rights and Responsibilities Act and the politics of child protection and education' (1996) 57 *Ohio State Law Journal* 393; P Montague 'The myth of parental rights' (2000) 26 *Social Theory and Practice* 47 and N Lowe 'The meaning and allocation of parental responsibility - A common lawyer's perspective' (1997) 11 *International Journal of Law, Policy and the Family* 192, 193.

³³³ Note 68 above.

³³⁴ At 176D.

³³⁵ For the significance of the shift from parental authority to parental responsibility, see generally J Herring *Family law* 3 ed (2007) 400-12 and J Bridgeman, H Keating and C Lind (eds) *Responsibility, Law and the Family* (2008) 1-20.

exercise by children of their rights. According to the South African Law Reform Commission (SALRC), ‘the common law concept of “parental power” is outmoded and unsatisfactory’ and the legislative shift away from parental power is consistent with South Africa’s international obligations.³³⁶ The notion of parental responsibility, formally incorporated into the Children’s Act, empowers children to assert their rights and enables the state to require parents to act in a manner consistent with the best interests of the child. Finally, parental responsibility is not only limited by state intervention in decision-making, but also by the child’s growing maturity.

6.4 The developing maturity of the child

In line with international law and South African common law,³³⁷ the Children’s Act recognises that the child’s developing maturity limits parental responsibility in respect of the child. By necessary implication, the child’s maturity also limits the levels of protection parents and the state should provide to children who have the mental capacity to understand the nature, benefits, risks and social implications of particular decisions. The liberating effect of the child’s developing maturity is recognised in many statutory provisions which refer either to ‘age, maturity and stage of development’³³⁸ or to ‘sufficient maturity and mental capacity to understand the benefits, risks and social implications’³³⁹ of certain decisions. Besides, care for

³³⁶ South African Law Commission, Review of the Child Care Act, Discussion Paper 103 (Project 110, 2002) 193.

³³⁷ See sections 5.3.1.2 and 6.3 of Chapter Three and 5.2.1 of Chapter Four.

³³⁸ Section 6(5) provides that a child, in light of their age, should be informed of an action or decision that affects them; section 7(1)(g) provides that the child’s age, maturity and stage of development are some of the factors to be considered in determining whether a particular decision is in the best interests of the child; section 10 and 31(1)(a) refer to the child’s age, maturity and stage of development as factors to be considered in determining whether the child should participate and how much weight is to be attached to the child’s views; section 12(10) allows every male child, in light of his age, maturity and stage of development, to refuse circumcision; section 61(1) permits children, in light of their age, maturity and stage of development, to express a view and a preference during children’s court proceedings; section 233(1)(c) allows a child who is under the age of 10 years to consent to their own adoption provided they are of such an ‘age, maturity and stage of development’ as to understand the implications of such consent; and section 234(1)(b) provides that a post-adoption agreement between the parent or guardian of the child and a prospective adoptive parent may not be entered into without the consent of a child who is of such ‘an age, maturity and stage of development’ as to understand the implications of the agreement.

³³⁹ Section 129(2) and (3) provides that a child who is over 12 years of age is entitled to consent to her own medical treatment or surgical operation provided they have sufficient maturity and mental capacity to understand the benefits, risks, social and other implications of the treatment or surgical operation; section 130(2)(a) allows a child who is 12 years of age or older to consent to an HIV test on them if they have sufficient maturity and mental capacity to understand the benefits, risks, social and other implications of the test; section 132(1)(b) provides that an HIV test may be performed only after proper counselling of the child if such child has sufficient maturity and mental capacity to understand the benefits, risks, social and other implications of the test; and section 133(2) stipulates that

the child is defined to include ‘guiding, directing and securing the child’s education and upbringing in a manner appropriate to the child’s age, maturity and stage of development’.³⁴⁰ These provisions directly impose on parents and the state the duty to make decisions which respect the developing maturity of every child. Finally, the protective and emancipatory roles of the child’s developing maturity have been discussed in detail above and it is not necessary to repeat the main arguments made in the relevant sections.³⁴¹

7 CONCLUSION

This chapter traced the historical development of children’s rights in South Africa and explained that domestic law, in line with international law, portrays children not as the property of their parents, but as distinct holders of rights to provision, protection, participation and autonomy. Given that the Bill of Rights and the Children’s Act apply horizontally and vertically, children may claim these rights against parents and the state. The horizontal application of the Bill of Rights also allows individuals, public interest organisations and the state to prevent violations of children’s rights by parents or guardians and to sue parents or guardians who make decisions that are not in the child’s best interests.

South African law is consistent with international law, albeit in a different way, in recognising the centrality of all general principles in the implementation of children’s rights. It recognises the best interests of the child, non-discrimination and the right to participate as general principles of children’s rights. Although not directly recognised as a general principle, the importance of the rights to life, survival and development has been acknowledged through the constitutional protection of the non-derogable right to life and socio-economic rights. Regardless of whether or not they are protected as general principles, these rights perform the same functions they perform at international law.

a child below the age of 12 years may consent to the disclosure of their HIV-positive status if they have sufficient maturity and mental capacity to understand the benefits, risks and social implications of such a disclosure.

³⁴⁰ Section 1(1)(e) of the Children’s Act. In terms of section 1(1)(f) of the Children’s Act, care also includes ‘guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child’s age, maturity and stage of development’.

³⁴¹ See sections 5.3.1.2 and 6.3 of Chapter Three. See also section 5.2.1 of this chapter.

With regards to children's protection rights, it has been noted that they play an important role in drawing the boundaries of children's autonomy, parental responsibility and state intervention. Parents and the state have the authority to limit the self-destructive exercise of autonomy rights by children the same way parents and the state may be dragged to court for threatening the child's protection rights, particularly the right to life. Protected by several provisions in the Children's Act, direct participation rights enable every child to take part in family, judicial and administrative processes by which their destiny is shaped, and require decision-makers to give due, not necessarily determinative, weight to the views expressed by the child. Thus, the weight to be accorded to the child's views depends not only on the complexity of the matter, but on the child's age, developing competences and best interests. By protecting the child's right of access to court and liberalising rules governing standing, the Children's Act enables children, public interest organisations and the state to seek remedies for violations of children's rights. Read together with the child's right to be assisted in bringing matters to court and the liberalisation of *locus standi*, the child's right to legal representation connects the general right to participate with the procedural right to be heard in court proceedings. Thus, the relevant provisions are intended to protect children's interests in the decision-making process.

Both the Constitution and the Children's Act demonstrate that children are not only objects of parental care and state protection, but bearers of autonomy rights as well. This is evident from an array of constitutional provisions entrenching autonomy-related rights such as privacy, human dignity, access to information and freedom of expression, freedom and security of the person, and reproductive health. Cumulatively, these rights broaden child autonomy and limit forms of parental supervision that are inconsistent with the child's protection rights, developing maturity, and best interests. However, these autonomy rights should be read together with parental responsibility and state intervention in the decision-making process. As observed above, parents have the autonomy to raise children the way they see fit and to limit the abusive exercise of autonomy rights by the child.

The common law powers associated with the notion of parental authority have largely been preserved under the Constitution and the Children's Act. However, the focus has now shifted from the powers associated with parental authority to the responsibilities placed on parents by

children's rights. This shift implies that the state and courts may intervene in the family and override parental decisions that are inconsistent with children's protection rights, best interests and developing competences. In the next chapter, this study investigates the extent to which South African law balances the need both to empower children to make personal decisions and to authorise parents and the state to protect incompetent children from personal decisions that are inconsistent with their best interests. This investigation takes place in the context of medical decision-making.

CHAPTER FIVE: BALANCING CHILD AUTONOMY, PARENTAL RESPONSIBILITY AND STATE INTERVENTION IN MEDICAL DECISION-MAKING UNDER SOUTH AFRICAN LAW

1 INTRODUCTION

Chapter Four demonstrated that South African law domesticates, albeit in a slightly different way, international standards on children's rights, parental responsibility and state intervention. This is done by portraying the child as an individual with interests that are distinct from those of parents and families; domesticating general principles of children's rights; protecting child autonomy-related rights; codifying parental responsibility and entrenching children's protection rights as a means of either authorising parents to limit child autonomy rights or permitting the state to intervene in the family to protect children from themselves or from parents. Accordingly, this study has so far demonstrated, at a general level, that child participation rights, parental responsibility and state intervention are capable of reconciliation when consideration is given to the child's best interests; protection rights (particularly the right to life, survival and development); and evolving capacities. In certain circumstances, the need to protect and empower children may require the state and courts to allow competent children to make autonomous decisions without parental consent. Whether made by children, parents or the state, all decisions affecting children should comply with these principles.

This chapter investigates the extent to which the Children's Act balances children's autonomy rights, parental responsibility and state intervention in medical decision-making. In order to do so, the chapter explains who has the legal capacity to make medical decisions and under what circumstances and tests the legal framework's compliance with the principles discussed in earlier chapters. The reasons for choosing medical and reproductive decision-making were explained in the introductory chapter of this thesis. In Chapter One,¹ this study demonstrated that the primary

¹ See section 5 of Chapter One.

reason for choosing medical treatment or surgery as one of the focus areas is that consent to or refusal of treatment or surgery may have such dangerous effects as serious injury, permanent disability or death of the patient. If a doctor administers treatment or performs surgery on a child without the child's (or the parent's) consent, this may well lead to liability in delict, particularly where death results from the relevant medical procedure. The fact that there is debate on whether children have the competence to understand what each proposed medical intervention means for their medical condition stands as another reason for the focus on medical decisions. Matters relating to education and religion, for instance, do not generate the danger and ethical issues that arise in the context of medical treatment and reproduction. Nor do these matters directly result in the loss of human life or threaten survival.²

Consent to medical treatment or surgery is now comprehensively regulated by the Children's Act.³ Consequently, this chapter examines the extent to which the relevant provisions of the Children's Act either erode parental responsibility and grant decisional autonomy to children or create an appropriate balance between children's autonomy, parental responsibility and state intervention in medical decision-making. Given that the child's autonomy largely turns on whether they have 'sufficient maturity and mental capacity' to understand the risks, benefits and social implications of the proposed intervention, this chapter also discusses the meaning of 'sufficient maturity and mental capacity' and its relationship with the concept of informed consent. With regards to informed consent, the National Health Act (NHA)⁴ and the common law stipulate the conditions that must be met for the child to be held to have given informed consent to treatment. Finally, the chapter also discusses the statutory rules governing emergencies and circumstances in which the state may intervene. By way of background, the discussion starts with a restatement of the legal position under the common law and the now defunct Child Care Act.

² While being a Jehovah's Witness may influence a child to refuse medical treatment (blood transfusion for example) and ultimately cause death, it is not the child's religious orientation which directly causes death, but the refusal to take medical treatment or undergo surgery.

³ Act 38 of 2005.

⁴ Act 61 of 2003.

2 MEDICAL TREATMENT AND SURGICAL OPERATIONS UNDER THE COMMON LAW AND THE CHILD CARE ACT

Generally, the common law position reflects conflicting views about children's capacity to consent to medical treatment and surgical operations. Boberg thought that a minor had no capacity to make such decisions,⁵ while Strauss felt that minors might, in certain circumstances, have such capacity even without parental consent.⁶ The common law mainly protected parental rights and duties until the child attained majority status.⁷ Thus, minors were generally incapable of providing informed consent to treatment. The common law rules of parental consent were consistent with 'notions of family privacy, parental autonomy, the importance of familial bonds [and] the narrower construction of the notion that parents are legally responsible for the care and support of their children'.⁸

Later, consent to medical treatment and procedures were governed by the now repealed Child Care Act.⁹ Under the Child Care Act, children below the age of 14 years had no legal capacity to consent to any medical intervention. The decision on which intervention was appropriate entirely belonged to the child's parents, guardians, or the medical profession who were under an obligation to act in the best interests of the child.¹⁰ In most cases, parents would probably decide on the course of action to be taken if the child was below the statutory age of consent, with no obligation whatsoever to consult with the child. This approach was also reinforced by the child's limited capacity to act and to litigate.

Children over the age of 14 years, but younger than 18 years, were competent, without the consent of their parents, to consent to medical treatment.¹¹ However, they were still incompetent

⁵ PQR Boberg *Law of persons* 1 ed (1977) 643.

⁶ SA Strauss *Doctor, patient and the law* 3 ed (1991) 171-74.

⁷ For a discussion of Roman-Dutch law and its application in South Africa, see *Van Rooyen v Werner* (1892) SC 425, 428-29 and C Ngweni 'Health care decision-making and the competent minor: the limits of self-determination' *Acta Juridica* (1996) 132, 139-43.

⁸ RH Mnookin and DK Weisberg *Children, family and state: Problems and materials on children and the law* 6 ed (2009) 373.

⁹ Act 74 of 1983.

¹⁰ Section 39 (4) of the Child Care Act.

¹¹ Section 39(4)(b) of the Child Care Act. See also ID Schiifer and L Schafer 'Children, young persons and the Child Care Act' in JA Robinson (ed) *The law of children and young persons in South Africa* (1997) 91.

to consent unilaterally to the performance of an *operation* upon themselves. Only children 18 years or older (the age of majority was 21 years at the time) were competent to consent to surgical operations without the assistance of their parents or guardians.¹² The legal incapacity of minors was not predicated solely upon an idea of natural cognitive deficiency, but more concretely on the absolute authority of fathers (and eventually mothers) to decide what services their child would receive.¹³ Medical care for minors operated against a set of background family law rules that imposed varying levels of responsibility on parents to provide for the medical care of their minor children.¹⁴

On the whole, the principles governing consent to medical treatment and surgical operations – under the common law and the Child Care Act – placed more emphasis on the child’s age rather than developing capacities and young competent children below the stipulated ages could not independently consent to treatment without parental consent. In the context of surgical operations, this challenge was compounded by the fact that the statutory age of consent was very high and denied adolescents who would be on the verge of the age of majority today, an opportunity to authorise (without parental approval) doctors to carry out surgery to save the patient’s own life.

However, the Child Care Act permitted some degree of state intervention with parental ‘authority’ in respect of the child. In cases of necessity, section 39(1) of the Child Care Act permitted medical practitioners to report to the Minister of Social Development instances in which the parent or guardian of a child had refused to give consent to medical interventions or could not be found or could not give consent due to mental illness or was deceased. The Minister would then give consent to the medical treatment or operation of the child ‘if satisfied that the operation or treatment [was] necessary’.¹⁵ Section 39(2) of the Child Care Act permitted the medical superintendent of a hospital or their surrogate to consent to the medical treatment of or surgery on the child if it was necessary to save the child’s life or to protect the child from serious

¹² Section 39(4)(a) of the Children’s Act.

¹³ L Kelly *Understanding young people’s right to decide: Why is it important to develop capacities for autonomous decision-making* (International Planned Parenthood Federation; 2012) 2.

¹⁴ Ibid.

¹⁵ Section 139(1) of the Child Care Act.

physical injury or disability in emergency situations.¹⁶ Finally, section 53(4) of the Child Care Act authorised the head of an institution in whose custody any child was, to consent to emergency medical interventions on the same grounds. Today, consent to medical treatment or surgery are predominantly regulated by the Children's Act. The relevant provisions thereof are discussed below.

3 CONSENT TO MEDICAL TREATMENT AND SURGICAL OPERATIONS UNDER THE CHILDREN'S ACT

Unless driven by the need to address an emergency or avert a danger to public health, unauthorised medical interventions constitute violations of the constitutional right to physical integrity. To be legitimate, these violations should be authorised by the child or another person with the legal authority to do so.¹⁷ Even at common law, unauthorised treatment could be the basis of a delictual claim.¹⁸ For a health professional to be acting lawfully in touching a patient, they should demonstrate the presence of any of the following defences: (a) the consent of the

¹⁶ Section 39(2) of the Child Care Act. For the superintendent to consent to treatment or surgery under this subsection, the need for the medical intervention had to be so 'urgent that it' could not have been 'deferred for the purpose of consulting the parents or guardian of the child'.

¹⁷ See also B Sneiderman and D McQuoid-Mason 'Decision-making at the end of life: The termination of life-prolonging treatment, euthanasia (mercy-killing), and assisted suicide in Canada and South Africa' (2000) XXXIII *Comparative International Law Journal of South Africa* 193, 194 and Medical Protection Society, *Consent to Medical Treatment in South Africa - An MPS Guide* 2 ed (2010) 1, stating as follows.

To treat competent patients without their valid consent is a violation of their constitutional rights and transgresses a fundamental principle of medical law. The basic rule is simple: no-one has the right to touch anyone else without lawful justification and if doctors do so it may well undermine patients' trust as well as violate their rights to physical integrity.

¹⁸ In *Stoffberg v Elliot* 1923 CPD 148, Watermayer J made the following remarks:

In the eyes of the law every person has certain absolute rights which the law protects. They are not dependent on statute or upon contract, but they are rights to be respected, and one of the rights is absolute security of the person...Any bodily interference with or restraint of a man's person which is not justified, or excused or consented to is wrong...[A] man by entering a hospital does not submit himself to such surgical treatment as the doctors in attendance upon him may think necessary. He remains a human being, and he retains his rights of control and disposal of his own body; he still has the right to say what operation he will submit to and any operation performed upon him without his consent is an unlawful interference with his right of security in and control of his own body and is a wrong entitling him to damages if he suffers any.

See also *Broude v McIntosh* 1998 (3) SA 60 (A) and *Sidaway v Bethlem RHG* [1985] 1 All ER 643, where Lord Scarman held that 'a doctor who operates without the consent of the patient is guilty of the civil wrong of trespass to the person; he is also guilty of the criminal offence of assault'.

patient; (b) the consent of another person authorised to provide consent on the patient's behalf or (c) necessity.¹⁹

Autonomy-related rights also empower competent children to authorise or refuse medical treatment, surgical operations, sterilisation, contraception and abortion. As demonstrated above, children's autonomy in medical decision-making is supported by an array of constitutional rights.²⁰ Today, consent to medical procedures is regulated by section 129(1)-(10) of the Children's Act. Generally, the relevant provisions can be divided into three categories. The first category relates to the relationship between, on the one hand, the provisions regulating medical treatment and surgical operations under the Children's Act and, on the other, the provisions regulating the termination of pregnancy under the Choice Act. The second category governs the parent-child relationship in the context of medical decisions and stipulate the circumstances under which either the child or the parent is entitled to make decisions on medical treatment and surgical operations. Finally, the provisions of section 129(6)-(9) enumerate specific instances in which courts, the state or health care providers should intervene in the family and make medical decisions that are in the best interests of the child. These sets of provisions are analysed below.

3.1 Medical procedures relating to the termination of pregnancy

Given that the termination of pregnancy also falls under the broad definition of medical treatment and surgical operations, the drafters of the Children's Act considered it necessary to explain the relationship between the law relating to the termination of pregnancy and the provisions governing consent to medical treatment and surgical operations under the Children's Act. Section 129(1) provides as follows:

Subject to section 5(2) of the Choice on Termination of Pregnancy Act, 1996 (Act No. 92 of 1996), a child may be subjected to medical treatment or a surgical operation only if consent for such treatment or operation has been given in terms of either subsection (2), (3), (4), (5), (6) or (7).

¹⁹ See generally *Re W* [1992] 4 All ER 627 at 633. See also J Herring *Medical law and ethics* (2006) 83-84.

²⁰ Section 5.3 of Chapter Four.

Subsections 129(2)-(7) of the Children's Act regulate the circumstances under which children, parents, hospital authorities or the Minister of Social Development may consent to the medical treatment of or surgical operation on a child. Section 129(1) provides that treatment decisions made by these persons and agencies are subject to the provisions of section 5(2) of the Choice Act.²¹ Section 5(2) of the Choice Act provides that the termination of a pregnancy can only take place with the informed consent of the pregnant woman (who in turn is defined as a female person of any age).²² This means that the consent of all the other persons is not necessary if the medical treatment or surgical operation is intended to terminate a pregnancy. Further, the requirements of age (12 years) and parental consent are not relevant to determining whether a pregnant minor should authorise medical treatment or surgical operations for purposes of terminating a pregnancy.²³ If the medical treatment of or surgical operation on a pregnant minor is intended to terminate a minor's pregnancy, the relevant provisions of the Choice Act supersede those of the Children's Act.²⁴ These provisions seek to ensure that children's reproductive autonomy is not frustrated by the provisions of the Children's Act.

3.2 Consent to medical treatment and surgical operations by competent children over the statutory age of consent

The Children's Act confers on every child the capacity to consent to medical treatment or surgery if they are over the age of 12 years and possess 'sufficient maturity and mental capacity' to understand the benefits and risks of the treatment.²⁵ Section 129 thereof provides as follows:

- (2) A child may consent to his or her own medical treatment or to the medical treatment of his or her child if-
 - (a) the child is over the age of 12 years; and
 - (b) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment.

²¹ See section 129(1) of the Children's Act.

²² See section 1(xi) of the Choice Act.

²³ However, the issue of 'sufficient maturity and mental capacity' may still be relevant since the termination of a pregnancy requires the pregnant minor to have the capacity to give informed consent to the relevant medical procedure.

²⁴ For similar views, see section 3.4 of Chapter Six.

²⁵ Section 129(2) and (3) of the Children's Act.

- (3) A child may consent to the performance of a surgical operation on him or her or his or her child if-
- (a) the child is over the age of 12 years; and
 - (b) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the surgical operation; and
 - (c) the child is duly assisted by his or her parent or guardian.

Once the child becomes an adolescent (defined in this study to mean a child aged 12 years or older),²⁶ they automatically pass the first leg of the inquiry into legal capacity and the question becomes whether or not they are of ‘sufficient maturity and mental capacity to understand the benefits, risks and social implications’ of the proposed medical intervention.²⁷ On the positive side, age is generally a reliable predictor of competence to consent to health services as adolescents and adults tend to be more mature than the very young. The stipulation of 12 years as the specific age at which children roughly acquire capacities for rational autonomy creates some degree of legal certainty for treating physicians. This avoids challenges that arise from discretionary systems in which parents and health service providers are reluctant to recognise minors’ competence to give informed consent to medical interventions.²⁸

An obvious shortcoming of the criterion of age is that it potentially disenfranchises competent children below the statutory age of consent, particularly if it is too high to risk excluding children with the ability to give informed consent to treatment. This is certainly not the case in the South African context. If the age of consent is very low, it risks conferring autonomy on children who lack the capacity for rational action and allows incompetent children to make treatment decisions that are not in their best interests. This study demonstrates, below, that this is potentially the case in South Africa.²⁹ However, one of the enduring strengths of the current legal framework is that it ties age to the development of capacities for rational action. Age alone does not ground decisional autonomy in medical decision-making. The use of the word ‘and’ at the end of section 129(2)(a) shows that an over 12 should still have ‘sufficient maturity and mental capacity’ in

²⁶ See section 2.1 of Chapter One.

²⁷ Section 129(2)(b) and (3)(b) of the Children’s Act. For a detailed discussion of the statutory provisions governing consent to medical treatment, surgical operations and other health-related procedures, see L Jamieson and L Lake *Children’s Act guide for health professionals* 5 ed (Children’s Institute: University of Cape Town, 2013) 37-57.

²⁸ See Committee on the Rights of the Child, *General Comment No. 12: The right of the child to be heard*, UN Doc. CRC/C/GC/12 (2009) at para 102.

²⁹ See section 3.4.1 of this chapter.

order to make independent medical decisions.³⁰ This does not mean that parental guidance is not important. It merely means that when a competent child cannot agree with their parents on whether the proposed medical treatment is in the child's best interests, the ultimate decision belongs to the child.³¹

The statutory reference to 'sufficient maturity' signifies the role of the child's evolving capacities in determining the levels of protection and autonomy to be enjoyed by a child in the context of medical decision-making.³² In a manner consistent with some theories of rights, international law and domestic law, section 129(2)-(5) of the Children's Act reiterates the idea that as children grow in age and experience, they should be given more responsibility for the exercise of their rights in medical decision-making.³³ At a deeper level, the focus on children's developing maturity emphasises the notion that parents have no special claims of ownership or control over children as the latter are independent persons with distinct rights and interests.³⁴

More importantly, the Children's Act is consistent with the CRC in that it recognises that children's capacities develop at different rates.³⁵ Some children experience average to severe intellectual developmental delay and may lack 'sufficient maturity and mental capacity' to give informed consent to treatment even after attaining the age of 12 years. The statutory reference to 'sufficient maturity' enables parents, doctors and the state to ensure that incompetent children enjoy protection in the medical decision-making context.³⁶ The dangers which may emanate from unrestrained liberty impose on parents and the state the duty to control children and prevent them from harming themselves.³⁷ This is particularly important for children at the extreme end of severe intellectual developmental delay as such 'children have very marginal autonomous

³⁰ See J Sloth-Nielsen 'Protection of children' in CJ Davel and AM Skelton (eds) *Commentary on the Children's Act* (2007) 7-1, 7-63

³¹ See D McQuoid-Mason 'Provisions for consent by children to medical treatment and surgical operations, and duties to report child and aged persons abuse' (2010) 100 (10) *South African Medical Journal* 646, 646.

³² See sections 3.3, 4.3 and 5.3 of Chapter Two. See also section 6.3 of Chapter Three.

³³ See sections 5.3.1.2 and 6.3 of Chapter Three, and 5.2.1 of Chapter Four.

³⁴ See section 3.3 of Chapter Two.

³⁵ See sections 5.3.1.2 and 6.3 of Chapter Three.

³⁶ See section 5.3.1.2 of Chapter Three.

³⁷ See sections 2.3, 3.3 and 4.3 of Chapter Two.

interests³⁸ and therefore deserve maximum protection.³⁹ The phrase ‘sufficient maturity’ incorporates these principles into the legal framework governing consent to medical treatment and surgical operations.

Adolescents who possess ‘sufficient maturity and mental capacity’ still need parental assistance (not consent) in order to give valid consent to surgical operations.⁴⁰ In this respect, the provisions governing consent to surgical operations are stricter than those governing consent to medical treatment. This distinction is attributable to the fact that surgical operations are generally more intrusive than medical treatment.⁴¹ It demonstrates some measure of restraint in bestowing on children the autonomy to make decisions that may cause death, serious bodily injury or permanent disability.⁴² Given the great level of post-operative care that often follows complex surgical operations, the stipulation that the child be duly assisted by their parents is patently reasonable and justifiable.⁴³

In terms of the Child Care Act, all children below the age of 18 years needed parental consent (not assistance) for an operation to be done on them. The Children’s Act explicitly provides that it is the child who should, with the guidance of the parent, give consent to surgical operations. On the one hand, parental consent is consistent with the notion of parental power and revolves

³⁸ G Birchley ‘What limits, if any, should be placed on a parent’s right to consent and/or refuse to consent to medical treatment for their child?’ (2010) 11 *Nursing Philosophy* 280, 283.

³⁹ See sections 3.3, 4.3 and 5.3 of Chapter Two. See also sections 5.3.1.2 of Chapter Three and 5.2.1 of Chapter Four.

⁴⁰ Section 129(3) of the Children’s Act provides that ‘[a] child may consent to the performance of a surgical operation on him or her or his or her child if-

- (a) the child is over the age of 12 years; and
- (b) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the surgical operation; and
- (c) *the child is duly assisted by his or her parent or guardian*’.

⁴¹ In medical terms, an ‘operation’ is defined as ‘any form of surgical procedure major enough to require anaesthesia’ and ‘treatment’ is defined as ‘care, in terms of medication, nursing and any other therapy, medication, nursing and any other therapy, designed to cure a disorder’. See *Harrap’s Dictionary of Medicine and Health* (London: Harrap, 1988) 288 and 395. This distinction is important for purposes of understanding why the law’s approach to consent to medical treatment and surgical operations are different. See section 129(2) and (3) of the Children’s Act.

⁴² See generally *An NHS Trust v MB* [2006] 2 FCR 319.

⁴³ See generally the case of *Re T (Wardship: medical treatment)* [1997] 1 WLR 242, 251-52. See also J Bridgeman *Parental responsibility, young children and healthcare law* (2007) 137-42 and M Jonas ‘The baby MB case: Medical decision-making in the context of uncertain infant suffering’ (2007) 33(9) *Journal of Medical Ethics* 541, 546.

around the parent's control of the child.⁴⁴ On the other hand, parental assistance emphasises that parents should guide children to make rational medical decisions.⁴⁵ There is room for arguing that where an adolescent is competent enough to give informed consent to a surgical operation,⁴⁶ the role of the parent is largely ceremonial. If the parent unreasonably refuses to assist the child, the parent's views may be ignored and the child's decision will be upheld.⁴⁷ This is because parental assistance is less imperative than parental consent.

The Children's Act confers on sufficiently mature adolescents the autonomy to make treatment decisions that are in their best interests. Read with the child's autonomy-related rights,⁴⁸ subsections 129(2), (3) and (8) of the Children's Act allow competent children to claim autonomy from parental and state control in the context of treatment decisions. In this way, section 129 of the Children's Act disaggregates children's health care rights from those of parents and enables children to assert their rights against parents or guardians.⁴⁹ More importantly, this is happening as part of an immense revolution from parental and family rights to the individual rights of family members, especially women and children.⁵⁰ The relevant provisions symbolise a departure from the historical portrayal of children as 'voiceless property'⁵¹ and characterises children as ends, not means to the ends of parents, guardians or the state.⁵² In a manner consistent with sociological theory and the fiduciary model,⁵³ the Children's Act seeks to recognise the separate personhood of the child, to promote the idea that children are persons in their own right and to emphasise that children are not mere appendages to their parents or objects of social control.

⁴⁴ See section 6.1 of Chapter Four.

⁴⁵ See section 6.2 of Chapter Three.

⁴⁶ The elements of informed consent are discussed at section 3.5 of this chapter.

⁴⁷ Section 129(7)(a) of the Children's Act authorises the Minister to assist the child to give consent to surgical operations if the parent unreasonably refuses to do so. This provision is dealt with in detail when discussing state intervention in treatment decisions.

⁴⁸ See sections 5.3 of Chapter Three and 5.3 of Chapter Four.

⁴⁹ Compare with sections 3.3 of Chapter Two and 5.3 of Chapter Four.

⁵⁰ See section 6.2 of Chapter Four.

⁵¹ See sections 2.1-2.3 of Chapter Two.

⁵² See sections 2.3 of Chapter Two and 5.3.2 of Chapter Four.

⁵³ See sections 3.1-3.3 and 6.1-6.3 of Chapter Two.

By emphasising the importance of the child's own consent to treatment, the Children's Act moves away from parental rights and emphasise the child's right to bodily self-determination.⁵⁴ These developments are taking place at a time when parents are philosophically and legally seen as fiduciaries or responsible paternalists with duties towards children who are now bearers of autonomy rights.⁵⁵ The reduction of the legal age of consent to 12 years recognises the autonomy rights of a large number of children previously excluded from influencing treatment decisions.⁵⁶ This drive towards individual autonomy is evident even in the context of surgical operations as adolescents are now entitled to make these decisions and parents are only required to assist the child in giving consent. In terms of the Child Care Act, children below the age of 18 years could not consent to surgery as the legal capacity to do so was vested in the parents.⁵⁷

The stakes for autonomy are so high that both the Children's Act⁵⁸ and the NHA⁵⁹ allow competent adolescents to refuse treatment in certain circumstances. Adolescents with 'sufficient maturity and mental capacity' to give informed consent to treatment also have the right to deny treatment. Generally, informed refusal is the reverse of informed consent. By authorising the Minister of Social Development to override the child's unreasonable refusal of treatment, section 129(8) of the Children's Act indirectly acknowledges the child's right to refuse treatment in certain circumstances. Besides, the NHA extends to every health user the right to refuse medical treatment.⁶⁰ It further provides that '[e]very health care provider must inform a user of their right to refuse health services and explain the implications, risks, and obligations of such refusal'.⁶¹

Both the Children's Act and the NHA do not stipulate the conditions under which a child should be allowed to refuse treatment. In my view, where medical treatment only sustains life without improving its quality, it becomes questionable whether such treatment is beneficial or

⁵⁴ See section 5.3.4 of Chapter Four.

⁵⁵ See sections 3.3 and 4.3 of Chapter Two.

⁵⁶ For the legal position under the Child Care Act, see section 2 of this chapter.

⁵⁷ Section 39(4)(a) of the Child Care Act.

⁵⁸ Section 129(2), (3) and (8) of the Children's Act.

⁵⁹ Section 6(1)(e) of the NHA.

⁶⁰ Section 7(1) of the NHA provides that 'a health service may not be provided to a user without the user's informed consent'.

⁶¹ Section 6(1)(e) of the NHA.

burdensome.⁶² This view arises from the possibility that the right to life protects life of a particular quality, not just life for its own sake.⁶³ The premise of the minor's right to refuse treatment in such cases is that life is no longer life at all if it cannot be lived with dignity.⁶⁴ Competent children's right to refuse treatment becomes more compelling where the benefits of the proposed treatment are merely speculative or the medical procedure is experimental or where

⁶² For instance, it appears oppressive to force a competent child whose life has deteriorated to such an extent that the child, parents and doctors consider it no longer to be worthy living, to take medication or remain on life-support against their will. If the quality of life of the child is extremely poor and the diagnosis indicates that it cannot be meaningfully improved, the child should be allowed to refuse treatment and to die. What is meant by quality of life is far from clear, but it is arguable that a competent child should be permitted to refuse treatment and surgery if they are 'better off dead'. Steinbock defines 'better off dead' as 'life is so terrible that it is no longer a benefit or a good to the one who lives'. See B Steinbock *Life before birth* (1992) 120, L Doyal and D Wilsher 'Towards guidelines for withholding and withdrawal of life prolonging treatment in neonatal medicine' (1994) 70(1) *Archives of Diseases in Childhood* 46, 70 and M Freeman 'Children at the edge of life: Parents, doctors and children's rights' in MH Rioux, LA Bassar and M Jones (eds) *Critical perspectives on human rights and disability law* (2010) 117, 119-22.

⁶³ See *S v Makwanyane*, para 326-327, where O'Regan J made the following remarks:

The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the 1996 Constitution cherishes, but the right to human life: the right to share in the experience of humanity. This concept of human life is at the centre of our constitutional values ... [t]he right to life is more than existence - it is the right to be treated as a human being with dignity: without dignity, human life is substantially diminished.

In O'Regan J's view, the right to life means 'more than mere existence' and implies the presence of a particular quality of life. Her focus on life of a particular quality provides a possible ground for a patient to claim a constitutional right to refuse treatment when their life is no longer worth living and there is no chance of improvement. It portrays the deterioration of the quality of the patient's life as a possible ground for allowing an individual to choose death, in certain carefully defined circumstances, instead of continued life below the standard envisaged in the Constitution. O'Regan J's quality-of-life *dicta* suggest that the state's interest in protecting human life is not absolute and may be significantly limited in circumstances where the patient asserting the 'right to die faces serious deterioration of quality of life and human dignity due to some debilitating condition'. See G Quinot 'The right to die in American and South African constitutional law' (2004) XXXVII *Comparative International Law Journal of South Africa* 139, 171.

In his concurring opinion in *S v Makwanyane*, para 268, Mohamed DP raised, without answering, the question 'whether the right to life preclude[d] the practitioner of scientific medicine from withdrawing the modern mechanisms which mechanically and artificially enable physical breathing in a terminal patient to continue, long beyond the point when the "brain is dead" and beyond the point when a human being ceases to be "human" although some unfocused claim to qualify as a "being" is still retained?'. The questions Mohamed DP raises were answered in *Clarke v Hurst* 1992 (4) SA 630 (D) at 649G-H and 653A-C, and, in my view, are not difficult to determine because the patient would have reached a vegetative state. In such cases, the patient would be clinically dead and the 'practitioner of scientific medicine' should be allowed, with the consent of the patient's proxy, to discontinue artificial life support.

⁶⁴ This creates a narrow possibility for courts to allow terminally ill, but competent children to elect to refuse treatment on the basis that their lives are no longer worthy living. This argument does not question the intrinsic value of the right to life as discussed in Chapters Three and Four. It is not an argument for the recognition of an exception to the general rule that life plays a central role in determining the best interests of the child. Instead, it is an argument for the recognition of the fact that there are instances in which life is not worthy living and the child is 'better off dead'. In these circumstances, there is no right to life to talk about.

the refusal of treatment does not necessarily lead to permanent disability, serious injury or death, or where there is no consensus, among the treating physicians, about which procedure constitutes an appropriate remedy for the child's condition.⁶⁵ Under some of these circumstances, the best interests of the child become so indeterminate that it is difficult to know which option promotes such interests.⁶⁶ However, the child's right to refuse treatment should be construed narrowly because of the significance of the non-derogable right to life, the state's duty to preserve human life and the fact that refusal of essential treatment may result in death, grave injury or permanent disability.⁶⁷ This approach is also supported by common law rules placing euthanasia and assisted suicide within the scope of the definition of murder and other related crimes.⁶⁸ Overall, the Children's Act's focus on children's autonomy raises questions about the relevance of parental consent to medical procedures.

⁶⁵ According to Goldstein, the state would overcome the presumption of parental or child autonomy in health-care matters *only* if it could establish (a) that the medical profession is in agreement about what medical treatment or surgery is appropriate for the child; (b) that the expected outcome of that treatment is what society agrees to be right for any child, a chance for normal healthy growth toward adulthood or a life worth living; *and* (c) that the expected outcome of denial of that treatment would mean death for or serious harm to the child. Consequently, there is no justification for coercive intrusion by the state in those life and death situations (a) in which there is no proven medical procedure; *or* (b) in which parents and children are confronted with conflicting medical advice about which treatment procedure to follow; *or* (c) in which, even if the medical experts agree about treatment, there is no likelihood that the treatment will enable the child to pursue either a life worth living or a life of relatively normal healthy growth toward adulthood. See J Goldstein 'Medical care for the child at risk: On state supervision of parental autonomy' (1976-1977) 86 *Yale Law Journal* 645, 653. See also *In re Pogue*, Wash. Post, Nov. 14, 1974, § C, at 1, col I (No. M-18-74, Super. Ct., D.C., Nov. 11, 1974); *In re Osborne*, 294 A.2d 373 (D.C. Ct. App. 1972) (84-year-old Jehovah's Witness).

⁶⁶ See the discussion and the authorities cited at section 4.2 of Chapter Four.

⁶⁷ See SALRC, Review of the Child Care Act, Discussion Paper 103 (Project 110, 2002) (hereafter Discussion Paper on the Review of the Child Care Act) 488, stating that '[t]he Commission is of the view that there is a rational distinction to be made between giving consent and withholding consent and that it is right for the law to be reluctant to allow a child to veto treatment designed for his or her benefit, particularly if a refusal will lead to the child's death or permanent damage'.

⁶⁸ See *S v Smorenburg* 1992 CPD (unreported) where the Cape Provincial Division held that assisted suicide is an offence despite the motive of the person who assists the patient to die; *Ex parte Die Minister van Justisie: In Re S v Grotjohn* 1970 (2) SA 355 (A) where the then Appellate Division held that depending on the facts of the case, a person who assists another to commit suicide is guilty of murder, manslaughter, attempted murder or no crime at all; and *S v Hartmann* 1975 (3) SA 532 (C) where the Court convicted the deceased's son of murder. The accused had, in an attempt to end his father's suffering, injected him with drugs which resulted in his instant death. See also I Currie and J De Waal (ed) *The Bill of Rights handbook* 6 ed (2013) 258, 267, who argue that whilst the current law prohibits the active killing of another, 'life-sustaining treatment may be withdrawn even if this would cause the patient to die from natural causes'. The authors argue that the Constitution protects life that is worthy living and that the right to life, read with the right to dignity, 'incorporates a right to an existence consonant with human dignity'.

3.3 When is parental consent to treatment and surgery required?

In non-emergency situations,⁶⁹ parents or guardians have the responsibility for making medical decisions for two groups of children. Section 129(4) of the Children's Act provides that '[t]he parent, guardian or care-giver of a child may, subject to section 31, consent to the medical treatment of the child if the child is (a) under the age of 12 years; or (b) over that age but is of insufficient maturity or is unable to understand the benefits, risks and social implications of the treatment'. Similarly, section 129(5) of the Children's Act confers on parents or guardians the responsibility to consent to surgical operations, again subject to section 31, on behalf of the same categories of children. These provisions allow parents or guardians to make medical decisions for children (a) who are either below the age of 12 years or (b) whose capacities have not yet fully developed when they reach the statutory age of consent (12 years).⁷⁰

Children below the age of 12 years have no legal capacity to give consent to medical treatment and surgical operations. This lack of capacity is statutorily constructed and it matters not that the child in question factually possesses the 'sufficient maturity and mental capacity' required to make independent medical choices. Therefore, treatment and surgical decisions for children below 12 years of age are to be made by parents or guardians.⁷¹ Where there is no parent or guardian, decisions concerning medical treatment may be made by a caregiver.⁷² Only when a parent, guardian or caregiver is unable to give consent (or is deceased) or unreasonably refuses to grant consent to treatment will ministerial or court-ordered consent be sought to ensure that the child receives treatment or undergoes surgery.⁷³ For the very young, the legislative scheme for consent to medical treatment and surgical operations relies solely on age as a ground for denying them autonomy in decision-making. The Children's Act does not even refer to 'sufficient maturity and mental capacity' in respect of children below the age of 12 years and it does not

⁶⁹ For rules governing emergencies, see section 129(6) of the Children's Act and the discussion at section 4 of this chapter.

⁷⁰ Commenting on the relevant provisions of the Children's Act, McQuoid-Mason observes that '[i]f the child is not capable of giving such consent, the patient must be told that she will need her parent's or guardian's consent – except if it is an emergency and a parent or guardian cannot be contacted'. See D McQuoid-Mason 'Some consent and confidentiality issues regarding the application of the Choice on Termination of Pregnancy Act to girl-children' (2010) 3(1) *South African Journal of Bioethics and Law* 12, 13.

⁷¹ Section 129(4) and (5) of the Children's Act.

⁷² Section 129(4) of the Children's Act.

⁷³ Section 129(7) and (9) of the Children's Act.

explicitly say that such children are presumed to lack capacity for rational action. As will be seen below, parents have the responsibility to make decisions and children have the right to participate in the decision-making process.

Adolescents who lack ‘sufficient maturity and mental capacity’ to understand the benefits and risks associated with specific medical interventions also lack the legal capacity to give informed consent to such interventions unless the intervention in question is meant to terminate a pregnancy.⁷⁴ Parents or guardians have the responsibility to make decisions on behalf of this category of children. However, parental consent is not required for emergency medical interventions or access to abortion services.⁷⁵ The responsibilities that parents or guardians have in making medical decisions for incompetent adolescents or children under 12 years, is subject to section 31 of the Children’s Act.

Section 129(4) and (5) of the Children’s Act explicitly states that when parents make medical decisions for the two categories of children referred to above, they should do so subject to section 31 of the same legislation. Section 31 codifies every child’s right to participate and to have their views given due consideration when major decisions concerning them are made.⁷⁶ Section 31(1)(a) provides that ‘before a person holding parental responsibilities and rights takes any decision contemplated in paragraph (b) involving the child, that person must give due consideration to any views expressed by the child, bearing in mind the child’s age, maturity and stage of development’. According to section 31(1)(b), the relevant decisions include, among others, those concerning the child’s well-being and health care.⁷⁷ Cumulatively, these provisions emphasise that even young children are ends in themselves and should be heard before decisions

⁷⁴ Section 5(2) of the Termination of Pregnancy Act read with section 129(1), (4) and (5) of the Children’s Act.

⁷⁵ See section 3.1 of this chapter.

⁷⁶ Subsections 129(4) and (5) show that when parents make medical decisions, they should do so subject to section 31 of the Children’s Act. The rules governing parental responsibility in respect of incompetent children over the age of 12 years are similar to those regulating parental responsibility in respect of children under the age of 12 years. In both cases, reference to section 31 of the Children’s Act emphasises the importance of participation rights and of giving due weight to the child’s views even if the person holding parental responsibility ultimately makes the decision in the child’s best interests. Clearly, the views of an incompetent child who is well over the age of 12 years should be given more weight compared to the weight given to those of a child below that age.

⁷⁷ Section 31(1)(b)(iv) provides that ‘a decision referred to in paragraph (a) is any decision which is likely to significantly change, or to have an adverse effect on, the child’s living conditions, education, health, personal relations with a parent or family member or, generally, the child’s well-being’.

concerning their bodies are made.⁷⁸ Therefore, incompetent adolescents and children below 12 years of age have the right to influence medical decisions even if their views are not necessarily determinative.⁷⁹

Sections 129 and 31 of the Children's Act should be read together with the provisions of the National Health Act.⁸⁰ Section 8(1) of the NHA stipulates that a patient 'has the right to participate in any decision affecting his or her personal health and treatment'. The NHA further provides that '[i]f the informed consent required by section 7 is given by a person other than the user, such person must, if possible, consult with the user before giving the required consent'.⁸¹ Section 8(2)(b) of the NHA provides that a patient 'who is capable of understanding must be informed as contemplated in section 6 even if he or she lacks the legal capacity to give informed consent' to medical treatment. These provisions signify an attempt to ensure that the very young have the right to influence the medical decision-making process. Unlike the Child Care Act, the Children's Act recognises the participation rights of children below the statutory age of consent to medical treatment and surgical operations.⁸²

While the parent or guardian has the power to determine whether young or incompetent children should receive medical treatment, they are required to give such children meaningful opportunities for participation. This emphasises the idea that no one should decide the destiny of children capable of self-expression without involving them in the decision-making process.⁸³ Apart from promoting reconciliation and joint decision-making between parents and children, this approach underlines the need to empower young children to influence decisions on medical

⁷⁸ See sections 2.3 of Chapter Two and 5.3.2 of Chapter Four.

⁷⁹ It should be recalled that parental guidance includes the duty to ensure both that children achieve a competent childhood and to relinquish their proxy decision-making role to allow competent children to make decisions for themselves. See B Clarke 'From rights to responsibilities? An overview of recent developments relating to the parent/child relationship in South African common law' (2002) *XXXV Comparative International Law Journal of South Africa* 216, 226-27.

⁸⁰ Act 61 of 2003.

⁸¹ Section 8(2) of the NHA.

⁸² The relevant provision simply stated that children over the age of 14 years could consent to medical treatment and that those over 18 years could consent to surgical operations.

⁸³ See sections 4.4 of Chapter Three and 4.4 of Chapter Four.

interventions.⁸⁴ Finally, parental responsibility or children's autonomy in medical decision-making largely turns on the possession (or otherwise) of 'sufficient maturity and mental capacity' by the child seeking treatment or surgery.

3.4 Challenges and potential areas of reform

3.4.1 The problem with the age of 12 years

The age of 12 years is very low compared to the age of consent in other jurisdictions, including Zimbabwe⁸⁵ and England. In England, the statutory age of consent to medical treatment is 16 years and even then, the child's legal capacity to consent to treatment does not wipe out the parent's right to make medical decisions for the child.⁸⁶ Either of the two consents suffices for the treatment of a competent child. Unfortunately, the reduction of the ages of consent to medical treatment (from 14 years) and surgery (from 18 years) was not preceded by any empirical research into minors' capacities to consent to treatment or surgery.⁸⁷

⁸⁴ A Moyo 'Reconceptualising the paramountcy principle: Beyond the individualistic construction of the best interests of the child' (2012) 12(1) *African Human Rights Law Journal* 142, 171-72, where the author argues as follows:

Besides portraying children as citizens, the Children's Act portrays parents and children not as foes, but as partners who should assume joint responsibility for the harmonious development of the child's personality. Accordingly, the child and his or her family are no longer viewed as adversaries contesting for control of the child's life, but as partners in the enterprise of making the best decisions for the child...Under section 31(1)(a), children's views must be given due consideration before taking any major decision concerning the child. The fact that the Children's Act requires parents to elicit the views of the child and other holders of parental responsibilities shows that the interests of all the parties involved must be considered before making major decisions affecting the child.

⁸⁵ In Zimbabwe, section 76(1) and (2) of the Children's Protection and Adoption Act stipulates that consent to the medical treatment of or surgical operation on children under the age of 18 years is to be given by the parent or guardian or by a magistrate if the parent or guardian refuses to give consent or cannot be traced within a reasonable period of time. See also G Feltoe and TJ Nyapadi *Law and Medicine in Zimbabwe* (1989) 42.

⁸⁶ See section 16(1)-(3) of the Family Law Reform Act 1969.

⁸⁷ In its Discussion Paper on the Review of the Child Care Act, 470, para 11.4.5, the SALRC recommended that all children aged 12 years or older be allowed to make treatment decisions without parental consent, provided that they could not consent to surgical operations without the assistance of parents until they reached 18 years of age. The SALRC would, in its *Report on the Review of the Child Care Act*, 142, para 10.3.3, subsequently 'reaffirm its preliminary recommendation that the age at which children may consent to medical treatment be lowered to 12' years and the recommendation would soon form part of the Children's Act.

Children's intellectual development depends on a range of factors. These include nutritional, environments, social, cultural and other considerations.⁸⁸ Whilst many factors have broadened horizons for early maturation today, the Children's Act creates an anomaly in terms of which the majority of children born to poor families emerging from decades of racial segregation and institutionalised marginalisation are expected to develop capacities for rational action at an earlier age than their counterparts in developed countries. Chapter Three demonstrated that the lack of access to basic goods (and services) and limited opportunities for quality education undermine the development of the child's intellect and has implications for the levels of autonomy to which every child is entitled.⁸⁹ Generally, the majority of South African children have limited opportunities to develop optimally and it is highly unlikely that they would have developed capacities for rational autonomy at the age of 12 years. This is potentially dangerous in cases where a 12 year old who is unassisted by parents or lives in the streets or in a child-headed household, is deemed competent to refuse life-saving treatment or surgery.

More importantly, the statutory 'ordination' of 12 years as the age at which children roughly attain the capacity for informed consent, potentially orientates medical practitioners at the beginning of the capacity-determination process, towards presuming every child over the age of 12 years competent to make independent treatment decisions.⁹⁰ Therefore, there is a real danger that pro-choice medical practitioners may deem incompetent children (over 12 years of age) 'competent' in order to administer medical interventions without parental consent or state intervention. This may result in decisions that are detrimental to children, especially where a child who has been wrongly determined to be competent, refuses to give consent to critical medical interventions. Statutory provisions regulating medical treatment stand in sharp contrast to the provisions of the Sterilisation Act.⁹¹ This piece of legislation, discussed in some detail in the next chapter,⁹² takes away decision-making powers from all children as only majors are entitled to authorise the performance of sterilisation procedures on themselves.⁹³ Unfortunately, the Sterilisation Act goes to the opposite extreme, protects the rights of parents and doctors, and

⁸⁸ See section 5.3.1.2 of Chapter Three

⁸⁹ See sections 4.3, 5.1 and 5.3.1.2 of Chapter Three.

⁹⁰ For similar reasoning in the context of sentencing children in trouble with the law, see *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (6) SA 632 (CC) paras 45-46.

⁹¹ Act 44 of 1998.

⁹² See para 2.2 of Chapter Six.

⁹³ Section 2(1) and (2) of the Sterilisation Act.

adopts the theory of paternalism in the decision-making process.⁹⁴ It does not recognise the developing competences of and disenfranchises many competent minors. This stands in sharp contrast to the idea, most fervently advanced by sociological theory, that children are active social agents with the ability to influence and make decisions.⁹⁵ Conversely, the Children's Act potentially empowers many incompetent children.

Ironically, the supposed recognition of young children's capacities in the medical decision-making context is taking place nearly at the same time when criminal law has been legislatively modified to accommodate the fact that children have limited capacities to appreciate the nature of their 'criminal' actions and to act in accordance with that appreciation. At common law, the minimum age of criminal responsibility was seven years.⁹⁶ Children below the age of 10 years are now irrebutably presumed to lack criminal capacity and those between the ages of 10 and 14 years are now rebuttably presumed to lack criminal capacity.⁹⁷ Against this background, it is difficult to understand how a child who is legally presumed to be incompetent to commit the most petty of all crimes may nevertheless be competent to make complex decisions such as refusing potentially life-saving treatment or surgery.

There are two concrete reasons why it is difficult for many children to acquire the capacity for rational autonomy at the age of 12 years.⁹⁸ The first is from neuroscience and the second can be derived from the way many families are socially organised. First, advances in magnetic resonance imaging (MRI) have made it possible for scientists to safely scan children and track the development of their brain over many years.⁹⁹ Neuroscientists have shown that the frontal lobe and the prefrontal cortex do not fully develop until the early to mid 20s.¹⁰⁰ The prefrontal cortex is the part of the brain responsible for high order or executive cognitive functions such as controlling impulses, calming emotions, prioritising thought, imagining, thinking in the abstract,

⁹⁴ For a detailed discussion on the theory of paternalism, see sections 4.2 and 4.3 of Chapter Two.

⁹⁵ See sections 6.1-6.3 of Chapter Two.

⁹⁶ For a detailed discussion on these changes, see J Burchell *Principles of criminal law* 4 ed (2013) 255-57.

⁹⁷ See section 7 of the Child Justice Act 75 of 2008.

⁹⁸ See National Research Council, *Adolescent and the biology of puberty* (1999).

⁹⁹ American Bar Association Juvenile Justice Centre *Adolescence, brain development and legal culpability* (January 2004).

¹⁰⁰ J Giedd, Frontline Interview, available at <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/giedd.html> (accessed 30 November 2009).

providing an appreciation of the consequences of one's conduct and informing considered, logical and rational decision-making.¹⁰¹ In an empirical study with 35 normally developing American children, Dr Sowell and others found that 'maturation, particularly in the frontal lobes, has been shown to correlate with measures of cognitive functioning'.¹⁰² In another study, the same researchers found that the frontal lobe undergoes far more change during adolescence than at any stage in life. The teenage brain, we are told, experiences a concentrated development of gray matter – the brain tissue responsible for reflection or thinking – followed by the process of 'pruning'.¹⁰³

Cortical grey matter density reduction (pruning) is either followed by or happens simultaneously with the growth of white matter (myelin) – fatty tissues which serve to insulate the brain circuitry, thereby enabling the brain to function more accurately.¹⁰⁴ This process is called myelination. The study also found that the abilities to plan, organise and regulate emotions continue to develop between adolescence (defined as ranging from 12 to 16 years in the study) and young adulthood (23-30 years).¹⁰⁵ There were competence differences between these categories, most likely as a result of 'increased myelination in peripheral regions of the cortex that may improve cognitive processing in adulthood'.¹⁰⁶ There is a positive correlation between brain growth and grey matter density reduction in the frontal and parietal lobes for people aged between 7-30 years – suggesting that full cognitive development may take up to three decades.¹⁰⁷ Findings have also been made that owing to the immature nature of their frontal cortex, adolescents rely on the amygdala – the locus of the brain which is associated with impulsive,

¹⁰¹ E Goldberg *The executive brain: Frontal lobes and the civilised mind* (2001) 35. See also N Gotey et al 'Dynamic mapping of human cortical development during childhood through early adulthood' (2004) 101 (21) *PROC. NAT'L ACAD. SCI. U.S.* 8174, 8174 and JM Fuster *The prefrontal Cortex: Anatomy, physiology, and neuropsychology of the frontal lobe* 2 ed (1989).

¹⁰² ER Sowell, PM Thompson, KD Tessner, and AW Toga 'Mapping continued brain growth and gray matter density reduction in dorsal frontal cortex: Inverse relationships during post-adolescent brain maturation' (2001) 21(22) *The Journal of neuroscience* 8819, 8819.

¹⁰³ ER Sowell, PM Thompson, CJ Holmes, TL Jernigan and AW Toga 'In vivo evidence for post-adolescent brain maturation in frontal and striatal regions' (1999) 2(10) *Nature Neuroscience* 859, 860.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.* See also JN Giedd, J Blumenthal, NO Jeffries, FX Castellanos, H Liu, A Zijdenbos, T Paus, AC Evans and JL Rapoport 'Brain development during childhood and adolescence: A longitudinal MRI study' 2(10) *Nature Neuroscience* 861, 862, stating that '[t]emporal-lobe gray matter also followed a nonlinear developmental course, but maximum size was not reached until 16.5 years for males and 16.7 years for females, with a slight decline thereafter. Occipital-lobe gray matter increased linearly over the age range, without evidence of significant decline or leveling'.

aggressive, emotional and ‘gut’ responses – and not the rational decision-making region – the prefrontal cortex.¹⁰⁸

Given that the prefrontal cortex determines social behaviour and knowledge, reflective judgment and conscious control of the tendency to behave impulsively, its immature state in adolescents expose them to ‘gut reaction’ as the ability to regulate emotions is severely impaired.¹⁰⁹ Echoing the dominance of the amygdala in youth behaviour, Deborah Yurgelun-Todd, then at the Harvard Medical School, observed:

[A]dolescents are more prone to react with gut instinct when they process emotions but as they mature into early adulthood, they are able to temper their instinctive gut reaction response with rational, reasoned responses...Adult brains use the frontal lobe to rationalize or apply brakes to emotional responses. Adolescent brains are just beginning to develop that ability.¹¹⁰

Beckman once quoted Steinberg as saying ‘capacities...are still developing when you are 16 or 17 years old’.¹¹¹ If brain science is anything to reckon with, it is highly likely that many children of 12 years are vulnerable to impulsive decision-making as they mainly rely on the amygdala than the frontal lobe and the pre-frontal cortex. Whilst these submissions do not stipulate what the age of consent to treatment or surgery should then be, it justifies the need to be careful when setting ages at which decisional autonomy is conferred on children. In fact, evidence from neuroscience suggests that children should, if at all, be given relative autonomy during mid-late adolescence (15-17 years) – the exact age should be informed by empirical research into children’s capacities for rational autonomy in specific contexts.

¹⁰⁸ The International Justice Project, ‘Brain development, culpability and the death penalty’ available at <http://www.scribd.com/doc/2169002/Brain-Development-Culpability-and-the-Death-Penalty-by-the-International-Justice-Project> (accessed 30 November 2009) and RJ Davidson ‘Anxiety and affective style: role of prefrontal cortex and amygdala’ (2002) 51 *Biological Psychiatry*, 68–80.

¹⁰⁹ E Cauffman and L Steinberg ‘(Im)maturity of judgment in adolescence: Why adolescents may be less culpable than adults’ (2000) 18 *Behavioural science and law* 743-44 and CC Lewis ‘How adolescents approach decisions: Changes over grades seven to twelve and policy implications’ (1981) 52 *Child development* 538, 541-42, where the author observes that grade seven and eight pupils considered future consequences of their conduct only 11 percent of the times.

¹¹⁰ G Talukder ‘Decision-making is still a work in progress for teenagers’ available at <http://brainconnection.positscience.com/topics/?main=news-in-rev/teen-frontal> (accessed 30 November 2009).

¹¹¹ M Beckman ‘Crime, culpability and the adolescent brain’ available at <http://www.deathpenaltyinfo.org/node/1225> (accessed 6 January 2009).

Finally, another reason for doubting the appropriateness of 12 years as an age of consent to medical treatment relates to the way many African families are sociologically organised.¹¹² In South Africa, there are multiple ethnic groups with diverse religious beliefs, cultural values, traditions and ways of living. The family – the single most important ‘place’ where children are dominated and learn to dominate or resist – remains a central agent in the inter-generational transfer of these beliefs, values and traditions. These beliefs and values are important in that the effectiveness of interventions in child protection is usually determined by a particular understanding the relationship between parents and their children. Given that local practices mediate the enjoyment of rights that are constitutionally due to the child, even in the context of medical treatment, there is need to consider specific sociological factors that affect children’s capacity or willingness to exercise autonomy in decision-making.

For our purposes, this is important especially in the context of the majority of children living in communitarian societies. In his autobiography, published during the consolidation of apartheid, Ezekiel Mphahlele states that ‘[w]e learned a great deal at the fireplace, even before we were aware of it: history, tradition and custom, code of behaviour, communal responsibility, social living and so on’.¹¹³ Children carry what they learn into adulthood and there is plenty of evidence that the majority of African (‘black’) children are trained to value group solidarity over individual human assertiveness. Whilst it has never been construed as a blanket disregard of individual liberty,¹¹⁴ the focus on group solidarity perpetuates the subordinate status of children and their exclusion from the decision-making process.

Group-orientation bureaucratises and collectivises decision-making, enables adults to articulate what they consider to be best for children (children are not members of traditional decision-making bodies such as the family council) and suppresses children’s contribution to decision making.¹¹⁵ Himonga puts this more forcefully when she observes that group solidarity makes the

¹¹² For a detailed sociological inquiry into childhood in South Africa, see sections 6.2 and 6.3 of Chapter Two.

¹¹³ E Mphahlele *Down Second Avenue* (1965) 17.

¹¹⁴ See T Nhlapo ‘Cultural diversity, human rights and the family in contemporary Africa: Lessons from the South Africa constitutional debate’ (1995) *International Journal of Law, Policy and Family* 208, 221.

¹¹⁵ T Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (2009) 117-18.

need to listen to children less imperative.¹¹⁶ Similarly, Rwezaura and other scholars have sufficiently demonstrated that the focus on group interests gives adults the opportunity to socialise children to submit to the authority of elders.¹¹⁷ Once this challenge is conceded, it raises questions about whether the majority of African children, living in remote rural areas and with limited knowledge about the complexities of modern medicine, would possess the competence to make independent treatment decisions at the age of 12 years.

Whereas globalisation, urbanisation, migration and modern education have led to the detribalisation of certain sections of society and to great cultural exchanges between individualistic and communitarian societies, the majority of children still live in families where individual autonomy is not an end goal of human development.¹¹⁸ This is not to argue that children who grow up in communitarian societies should not exercise participation and autonomy rights, but to demonstrate that the age of 12 years may be very low as the majority of children at that age will still be undergoing intense communitarian socialisation. This claim partly has support from sociological theory which recognises that culture and social context strongly shape individuals' intellectual development and determine people's capacities (for rational autonomy) at particular stages of their development.¹¹⁹

In addition, it should be recalled that under South African customary law, there is strong emphasis on the concept of duties rather than rights.¹²⁰ More importantly, these duties, now

¹¹⁶ C Himonga 'The right of the child to participate in decision making: A perspective from Zambia' in W Ncube (ed) *Law, culture, tradition and children's rights in Eastern and Southern Africa* (1998) 95, 117.

¹¹⁷ B Rwezaura, A Armstrong, W Ncube, J Stewart, P Letuka, P Musanya, I Casimiro and M Mamashela 'Parting the long grass: Revealing and reconceptualising the African family' (1995) 35 *Journal of Legal Pluralism* 25, 32-33; C Bledsoe *Women and marriage in Kpelle society* (1980) 55; RS Rattray *Ashanti law and constitution* (1956) 13 and H Kuper *Kinship among the Swazi* (1962) 96.

¹¹⁸ See G Clacherty and D Donald 'Child participation in research: Reflections on ethical challenges in the Southern African context' (2007) 6(2) *African Journal of AIDS Research* 147-56, who argue that cultural norms that enshrine power inequalities between adults and children are also prevalent urbanising and rural 'black' communities. See also TN Nhlapo 'Culture and women abuse: Some South African starting points' (1992) *Agenda* 5, 10, who argues that rising levels of urbanisation, the breakdown of the extended family, black middle class affluence, the growth of church membership and the breakup of traditional authority should not be pressed into duty to show that black people are shedding their old ways as living in town or attending church does not mean that people abandon their culture and important values such as communitarianism.

¹¹⁹ See sections 6.1-6.3 of Chapter Two.

¹²⁰ TW Benett 'The best interests of the child in an African context' (2002) *Obiter* 145, 150, arguing that 'customary law gave children no directly enforceable rights against their families, which is evident from the fact that it had no special institutions or regular procedures for protecting their interests'.

codified in regional instruments such as the African Children's Charter, include the duty to respect parents¹²¹ and to defer to adults in the decision-making context. These values are sometimes enforced on the pain of corporal punishment, a practice that has been found to correlate with diminished levels of child participation in the family.¹²² Many adults and children confuse respect with submissiveness and perpetual silence. This undermines the implementation of the child's rights to be heard and to have their views given due weight when decisions affecting them are made.¹²³ Whilst there is nothing intrinsically restrictive about the concept of respect for one's parents and elders in the community,¹²⁴ the way respect has been culturally and socially constructed impedes child participation rights.¹²⁵

In my view, very few 12 year olds growing up in communitarian societies would have acquired the competence to make informed decisions on medical interventions. This claim is also supported by a particularly restrictive construction of 'respect' which requires children to avoid questioning adult authority and to avoid showing an overbearing attitude when expressing their views in the decision-making process. In fact, power relations are so deeply entrenched in families and societies that it is difficult for children to develop the capacity for rational autonomy at the age of 12 years. To a larger extent, this is a universal problem which emanates from adults' reluctance to give away some of their power or to share it with children.¹²⁶ The emphasis on

¹²¹ See article 31 of the African Children's Charter.

¹²² See Community Agency for Social Inquiry and Save the Children Sweden, *An assessment of children's participation in the family in South Africa* (2006).

¹²³ See, for example, D Pellow *Women in Accra: Options for autonomy* (1977), 56, who argues that 'respect for one's elders, when carried to an extreme, rules out any chance of exercising free will'.

¹²⁴ K Gyeke *African cultural values: An introduction* (1996) 85, who observes that 'African parents, like parents in all other societies, want their children to develop good character traits, to...become ...respectful and respectable adults and responsible citizens'.

¹²⁵ S Moses 'Children and participation in South Africa: An overview' (2008) 16 *International Journal of Children's Rights* 327, 331-32, demonstrates that children are afforded little room to act independently as autonomy is not seen as an end goal of child development. She demonstrates that research in predominantly 'coloured' and 'black' townships in Cape Town has shown that clear lines of authority exist between adults and children. This research demonstrates that children's obedience and adult control are valued in both communities, with the 'coloureds' drawing on moral and religious values to justify adult paternalism and the 'blacks' drawing on cultural values. Values of obedience and respect for adults are emphasised with the result that children rarely speak up or voice their opinions to adults.

¹²⁶ See, for example, Save the Children Sweden, *Participation is a virtue that must be cultivated* (2008) 19, arguing as follows:

Power relations between adults and children are deeply embedded and can take generations to transform, as adults are generally reluctant to give up their power. Therefore, efforts to change adult perceptions, attitudes and behaviour are generally required over a long period of time. There is still reluctance among

respect and, in some communities, group solidarity aggravates this universal problem and further limits children's capacities to make treatment decisions at the age of 12 years. Sociological theory,¹²⁷ particularly its recognition of the role of culture and context in shaping the child's worldview and acquisition of capacity for rational autonomy, does not seem to support the view that many South African become capable of making independent treatment decisions at the age of 12 years.

3.4.2 The need to define 'sufficient maturity and mental capacity'

The Children's Act does not define 'sufficient maturity and mental capacity'. Similarly, there is no guidance on the list of factors to be considered in determining whether an adolescent is capable of making independent treatment decisions. This is a serious shortcoming because the ultimate decision on whether an adolescent is entitled to make independent treatment decisions depends on whether they have 'sufficient maturity and mental capacity' to understand the benefits and risks of the treatment in question. What is clear from the relevant provisions is that for 'maturity' to be 'sufficient', the child should understand the nature, risks and benefits of the medical procedure, but this alone does not say what 'maturity' itself is. For cases that never reach the courts, capacity-determinations are likely to be made by the physician responsible for treating the child.

The lack of clarity on what 'sufficient maturity' means leads to variations in determinations of adolescents' capacities for rational action. Pro-choice physicians are likely to deem the majority of incompetent adolescents 'competent' and to proceed based on the adolescent's choice. Second, conservative doctors who are sceptical about children's developing maturity may deny competent adolescents decisional autonomy by making a finding that they lack 'sufficient maturity' to make independent treatment decisions. In fact, the Children's Act does not specify who determines whether the child possesses 'sufficient maturity and mental capacity' to give consent to treatment. In all probability, doctors will make these decisions and the assistance of psychiatrists may be required if there is no agreement (between parents, the child and the

adults to really share power with children and to genuinely take account of their views. Adults also continue to under-estimate and undermine children's capacity to be involved.¹²⁶

¹²⁷ For a fuller discussion of this theory, see sections 6.1-6.3 of Chapter Two.

medical practitioner) on whether the child possesses the capacity for informed consent. There is a real conflict of interest because the same doctor who should not proceed without the child's informed consent to treatment may hardly impartially determine whether the child possesses 'sufficient maturity and mental capacity' to give informed consent to such treatment. This leaves wide room for medical practitioners to unduly influence children, especially where the latter turn up at hospitals without any parent or adult accompanying them.

However, the doctrine of informed consent provides a good starting point for any attempt to define 'sufficient maturity and mental capacity' to make independent decisions. An adolescent who fulfils the three elements of the doctrine of informed consent, discussed below, possesses 'sufficient maturity and mental capacity' to make rational medical decisions.¹²⁸ Further guidelines may be necessary. To begin with, it should be emphasised that there is no standardised test of maturity or capacity for informed consent. As argued in Chapter Three, the concept of maturity or capacity is decision and task specific.¹²⁹ A 'person may be competent to make a particular decision at a particular time, but incompetent to make another decision, or even the same decision, under different conditions'.¹³⁰ The nature and gravity of the child's medical condition determines how serious the intervention or treatment should be and dictates the kind of competence the child must possess for them to make an informed decision on whether to consent to such an intervention.¹³¹

Maturity is also task-specific in the sense that it is in relation to a specific treatment option rather than to treatment in general that a patient's competence should be measured.¹³² Diverse levels of medical procedures – from medical treatment to surgical operations, abortion and sterilisation – require different levels of maturity. The extent to which children can exercise autonomy or

¹²⁸ See section 3.5 below.

¹²⁹ Section 5.3.1.2 of Chapter Three.

¹³⁰ AE Buchanan and DW Brock *Deciding for others: The ethics of surrogate decision-making* (1989) 18. See also P Alderson, 'Consent to surgery for deaf children: Making informed decisions' in L Komesaroff (ed) *Surgical consent: Bioethics and cochlear implantation* (2007); G Landsown *Every child's right to be heard: A resource guide on the UN Committee on Right of the Child General Comment 12* (2011) 96 and C Aspinall 'Children and parents and medical decisions' (2006) 36(6) *Hastings Center Report* 3.

¹³¹ A patient may have the capacity to consent to routine medical treatment, but lack the required level of understanding to be able to consent to a far more complex procedure. See *Re W* [2002] EWHC 901 and *Gillick v West Norfolk and Wisbech Area Health Authority and Another* [1986] AC 112, 169 and 186.

¹³² In the English case of *Re R* [1991] 4 All ER 177, the Court observed that the child's competence to consent varies with the issue in question.

parents and the state can decide for and in the best interests of the child is different for each of these tasks. Maturity also relates to the child's knowledge, understanding and experience of the medical condition. Thus, the views of a mature child who has experienced the problem for long may be taken more seriously than those of a child with no experience regarding the medical condition in question.¹³³ However, the concept of 'sufficient maturity and mental capacity' largely depends on whether the child meets the requirements of informed consent to medical interventions.

3.5 Sufficient maturity, mental capacity and informed consent to medical treatment or surgical operations

Generally, the term 'maturity' should be defined to mean the intellectual ability to make a legally recognised decision in a rational manner.¹³⁴ The statutory reference to 'sufficient maturity' arises from the recognition that children's abilities develop at different rates and it is important to allow children to exercise autonomy relative to their cognitive abilities.¹³⁵ Mental capacity seems to refer to the question whether a particular child is of 'sound mind' in the sense that the child should, at the time of decision, neither be suffering from any mental illness nor be experiencing any temporary clouding of the mental faculties (due to intoxication, duress or undue influence) that impairs proper judgment in the decision-making process. Strictly speaking, mental capacity is determined by a physician, often (although not exclusively) by a psychiatrist, not the judiciary.¹³⁶ Given the lack of clarity in the Children's Act, this study construes 'sufficient maturity and mental capacity' to refer, generally, to the child's intellectual ability to make informed decisions.

¹³³ S Kling 'Ethical issues in treating children' (2011) 24(4) *Current Allergy and Clinical Immunology* 218, 218-19.

¹³⁴ For a comparative definition of competency, see SB Bisbing 'Competency and capacity: A primer' in American College of Legal Medicine Textbook Committee, SS Sanbar (ed) *Legal medicine* 4 ed (1998) 32-43.

¹³⁵ Reference to 'sufficient maturity' echoes Rawls' argument that parents and guardians should be guided by the child's 'own settled preferences and interests insofar as they are not irrational'. See J Rawls *A theory of justice* (1971) 249. See also the English case of *Gillick v West Norfolk and Wisbech Area Health Authority and another* (hereafter *Gillick case*) [1986] 1 AC 112, 186, where Lord Scarman held that a child acquires capacity for autonomy when he or she 'reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision'.

¹³⁶ For a detailed discussion, see RF Leo 'Competency and the capacity to make treatment decisions: A primer for primary care physicians' (1999) 1(5) *Primary Care Companion Journal of Clinical Psychiatry* 131-41.

The concepts of ‘sufficient maturity and mental capacity’ appear to codify the doctrine of informed consent. The doctrine of informed consent constitutes an inquiry into the child’s capacity for rational autonomy and ‘informed’ decision-making. It encourages rational decision-making by allowing patients to balance the risks and advantages of the proposed medical intervention before making an ‘informed’ decision on whether to consent to or refuse treatment or surgery.¹³⁷ The NHA defines informed consent as ‘consent for the provision of a specified health service given *by a person with legal capacity to do so* and who has been’ given appropriate information ‘as contemplated in section 6’ of the same Act. In addition, the NHA explicitly provides that ‘a health service may not be provided to a user [including a child] without the user’s informed consent unless’ certain specific conditions are met.¹³⁸ It also requires health care providers to ‘take reasonable steps to obtain the user’s informed consent’.¹³⁹ The doctrine of informed consent has three requirements: namely knowledge, appreciation and consent.¹⁴⁰

¹³⁷ See R Thomas ‘Where to from *Castell v De Greef*? Lessons from recent developments in South Africa and abroad regarding consent to treatment and the standard of disclosure’ (2007) 124(1) *South African Law Journal* 188, 189-94. See also *R (on the application of Burke) v GMC* [2005] 3 FCR 169, para 30, where the English Court of Appeal held that ‘[w]here a competent patient makes it clear that he does not wish to receive treatment which is, in his medical interests, it is unlawful for doctors to administer that treatment. Personal autonomy or the right to self-determination prevails’ and *Chester v Afshar* [2004] UKHL 41, para 18, where Lord Steyn explained:

A rule requiring a doctor to abstain from performing an operation without the informed consent of a patient serves two purposes. It tends to avoid the occurrence of the particular physical injury the risk of which a patient is not prepared to accept. It also ensures that due respect is given to the autonomy and dignity of each patient.

¹³⁸ Section 7(1) of the NHA.

¹³⁹ Section 7(2) of the NHA.

¹⁴⁰ *Castell v De Greef* 1994 (4) SA 408 (C) at 425. The Court was following the legal position under the common law as discussed by F Van Oosten *The doctrine of informed consent in medical law*, Unpublished doctoral thesis, University of South Africa (1989) 13-25. For related case law and academic authorities, see also *Waring & Gillow Ltd v Sherborne* 1904 Th 340 at 344; *Van Wyk v Lewis* 1924 AD 438 at 451; *C v Minister of Correctional services* 1996 (4) SA 292 (T) at 300; MA Dada and DJ McQuoid-Mason *Introduction to Medico-legal Practice* (2001) 5-32; A Meisel, LH Roth and CW Lidz ‘Toward a model of the legal doctrine of informed consent’ 134 *American Journal of Psychiatry* (1977) 285; DW Belling and C Eberl ‘Teenage abortion in Germany with reference to the legal system in the United States’ (1995-1996) 12 *Journal of Contemporary Health, Law and Policy* 475, 494; and PS Appelbaum and T Grisso ‘Assessing patients’ capacities to consent to treatment’ (1988) 319(25) *New England Journal of Medicine* 1635-638, who argue that informed consent includes the competence to communicate choices; to understand the relevant information upon which the choice is made; to appreciate the situation according to one’s own values and to weigh various values to arrive at a decision. According to the American Academy of Paediatrics Committee on Bioethics, informed consent includes the following:

- (a) an understandable explanation of the condition, the recommended treatment, the risks and benefits of the proposed treatment (abortion for present purposes) and any alternatives;
- (b) an assessment of the person’s understanding of the information provided;
- (c) an assessment of the competence of the minor or surrogate to make medical decisions; and

‘Knowledge’ means that the patient must be sufficiently informed so that they are aware of the nature of their condition and the proposed intervention.¹⁴¹ Given that many medical procedures are greatly technical in nature, child patients need appropriate information for them to make informed treatment decisions.¹⁴² A child may only give informed consent to treatment or surgery if they have received comprehensive information about the nature and full extent of the proposed

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- (d) an assurance that the patient or surrogate has the ability to choose freely between alternatives without coercion.

See American Academy of Paediatrics Committee on Bioethics, ‘Informed consent, parental permission, and assent in paediatric practice’ (1995) 95(2) *Paediatrics* 314-17.

¹⁴¹ *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T) at 719-20; *Pringle v Administrator, Transvaal* 1990 (2) SA 379 (W) at 381, 384, 393 and 397; *Administrator, Natal v Edouard* 1990 (3) SA 581 (AD) at 585; *Applicant v Administrator, Transvaal and Others* 1993 (4) SA 733 (T) at 739; *Castell v De Greef* (1994) at 425; *Louwrens v Oldwage* 2006 (2) SA 161 (SCA) and *McDonald v Wroe* [2006] 3 All SA 565 (C). See also MN Slabbert *Medical law in South Africa* (2011) 88, para 124;

¹⁴² In *Rompel v Botha* T.P.D., 15th April, 1953 (unreported), the Transvaal Provincial Division held as follows:

There is no doubt that a surgeon who intends operating on a patient must obtain the consent of the patient.... [I]n a case of this nature which may have serious results to which I have referred, *I have no doubt that a patient should be informed of the serious risks he does run. If such dangers are not pointed out to him then, in my opinion, the consent to the treatment is not in reality consent - it is consent without knowledge of the possible injuries. On the evidence defendant did not notify plaintiff of the possible dangers, and even if plaintiff did consent to shock treatment, he consented without knowledge of injuries which might be caused to him. I find accordingly that plaintiff did not consent to the shock treatment.*

In *Esterhuizen v Administrator, Transvaal*, the plaintiff, a 14 year old suffering from a recurrent tumour usually to occur on the extremities, the feet and the hands, had received superficial therapy treatment from the doctor on two previous occasions. The tumour is associated with the growth of nodules on the infected parts of the body. On the third occasion, another doctor decided that she required radical therapy as the disease was rapidly progressing, leaving the plaintiff with an estimated expectation of life of about one year. The medical doctor admitted that he knew of the consequences administering radical treatment on the child, but had informed neither the mother nor the child of the grave risk involved. The medical doctor admitted that he knew beforehand that the radical treatment which he decided to apply to the child-patient would expose her to (i) severe irradiation of the tissues in the treated areas and could possibly sustain ulceration of these tissues; (ii) become disfigured or deformed in the sense that permanent harm would be done to her (growing bone ends) in the treated areas, causing a shortening of the limbs; (iii) sustain ‘permanent visible damage to the skin’, darkening or lightening the skin, after the proposed radiotherapy; and (iv) increase the risk of having to suffer amputation of the treated limbs. When the child inquired about what was going to happen to her, she was told not to worry. Between December 1949 and August 1955, the applicant had both her legs and one hand amputated (with the possibility of losing her other hand) largely as a result of post-radiation malignant ulcers.¹⁴² At 721C-E, Bekker J, for the Court, held that-

a therapist, not called upon to act in an emergency involving a matter of life or death, who decides to administer a dosage of such an order and to employ a particular technique for that purpose, which he knows beforehand will cause disfigurement, cosmetic changes and result in severe irradiation of the tissues to an extent that the possibility of necrosis and a risk of amputation of the limbs cannot be excluded, must explain the situation and resultant dangers to the patient - no matter how laudable his motives might be - and should he act without having done so and without having secured the patient's consent, he does so at his own peril.

treatment or surgery. Today, the requirement of knowledge is largely fulfilled by the child's right of access to health-related information as discussed in Chapter Four of this study.¹⁴³

'Appreciation' means that the patient should have the ability to employ logic or rational thought processes to understand the information given.¹⁴⁴ The term 'sufficient maturity' is equivalent to the notion of 'appreciation'. To be competent to make autonomous decisions, children should be able to understand the information disclosed to them by the treating physician and to express a treatment choice based on that information. This includes the ability to weigh and balance rationally the benefits and disadvantages of the proposed medical intervention.¹⁴⁵ The more complex the intervention the more burdensome it is for the child to demonstrate that he or she has sufficient maturity and capacity to understand what is involved.¹⁴⁶ Competent children are those who possess the capacity to assess the probable consequences of the disease or the proposed treatment and the likelihood of each of a number of consequences occurring should the treatment be administered or not.¹⁴⁷

¹⁴³ See section 5.3.3 of Chapter Four.

¹⁴⁴ See J Heaton 'Capacity to perform juristic acts: Marriage and other acts' in B Van Heerden, A Cockrell and R Keightley (eds) *Boberg's law of persons and the family* 2 ed (1999) 835, 849, where the author refers to 'the ability to form an intelligent will on the basis of an appreciation of the nature and consequences of the act consented to'.

¹⁴⁵ See F Van Oosten 'The Choice on Termination of Pregnancy Act: Some comments' (1999) 116(1) *South African Law Journal* 60, 72 and A Dhali 'Informed consent' (2008) 1(1) *South African Journal of Bioethics and Law* 27, 27, where the author argues that to be able to give informed consent, an individual should have the capacity to 'deliberate about personal goals and to act under the direction of such deliberation'.

¹⁴⁶ In *Re E: (A Minor)(Wardship: Medical Treatment)* [1993] 1 FLR 386; the Court held that a Jehovah's Witness child who refused a blood transfusion was incompetent because he did not understand the gradual and painful nature of his death. See also DJ McQuoid-Mason and MA Dada 'The National Health Act: Some implications for family practice' (2006) 24(1) *Continuing Medical Education* 12, 13, who argue that health care providers can test the level of understanding of child patients by 'getting them to paraphrase their knowledge of the proposed treatment or procedure, their appreciation of the consequences of the proposed treatment or procedure, and their willingness to accept all the harm or risks involved in such treatment or procedure'.

¹⁴⁷ Lord Donaldson in *Re R (A minor)(Wardship: Medical treatment)* [1992] Fam 11 at 26A, CA, stated the following:

What is involved is not merely an ability to understand the nature of the proposed treatment...but a full understanding and appreciation of the consequences both of the treatment in terms of intended and possible side effects and, equally important, the anticipated consequences of a failure to treat.

In *Re S* [1993] 1 FLR 376, the Court stated that it was not confident that a 15 year old Jehovah's Witness who refused a blood transfusion was competent and in *Re L* [1999] 2 FLR 376, the court pursued the possibility that a child who grows up in a strict religious upbringing, having not been made adequately aware of alternative ways of seeing the world, can hardly be said to be sufficiently mature to make informed decisions concerning medical interventions.

Finally, the concept of ‘consent’ means that consent to the intervention should be voluntary, comprehensive and unequivocal. The child should be in the proper frame of mind to make an informed decision and should give consent in circumstances which do not vitiate the exercise of free will.¹⁴⁸ The requirement of voluntariness implies that a patient should not be coerced or manipulated or deceived to give consent.¹⁴⁹ This is because an individual cannot be held to have consented to bodily harm or to run the risk of such harm if he or she did not freely assume the harm or risk involved.¹⁵⁰ To be comprehensive, consent must ‘extend to the entire transaction, inclusive of its consequences’,¹⁵¹ should include consent to the ‘material risk’ of the proposed treatment¹⁵² and the patient must ‘subjectively consent to the harm or risk associated with the’ proposed medical intervention.¹⁵³ Consent must be unequivocal in the sense that both the patient and the medical practitioner must be clear about what exactly the patient is consenting to.¹⁵⁴ Every child who fulfils the three elements of informed consent is sufficiently mature and

¹⁴⁸ See also R Francis and C Johnstone *Medical treatment: Decisions and the law* (2001) 13, para 1.2.6, where the authors argue that ‘[c]onsent cannot be validly obtained from a person acting under their own free will ie where the will of the patient is overborne by circumstances over which he has no control’.

¹⁴⁹ See generally *Lampert v Hefer NO 1955 (2) SA 507 (AD)* at 508. In *Re T* [1992] 4 All ER 649, a young woman who had been involved in an accident and sustained serious injuries, had initially consented to a blood transfusion. After her mother, a devout Jehovah’s Witness, had visited her in hospital, T ‘out of the blue’ decided not to undergo the blood transfusion. The Court found that T had been weakened through pain, the effect of medication and tiredness, and that the closeness between T and her mother meant that the later could have unduly influenced the patient. It found that T’s refusal was not competent and authorised doctors to treat her and administer the blood transfusion. In *R v Tabassum*, [2000] LI Rep Med 404, it was held that a deception as to the nature or quality of the procedure could vitiate consent. In this case, a woman had consented to breast examination for educational purposes, but it turned out the person did the examination for his own purposes (sexual). The defendant was convicted for the offence of battery.

¹⁵⁰ See, for example, *Appleton v Garrett* (1995) 34 BMLR 23, where the court found that patients had not voluntarily consented to the treatment because the medical doctor had deliberately misinformed them for purposes of convincing them to consent to unnecessary treatment for his own financial gain.

¹⁵¹ *Castell v De Greeff* at 425.

¹⁵² To enable the child to give consent voluntarily, ‘the doctor is obliged to warn a patient so consenting of a material risk inherent in the proposed treatment’. A risk is material if (a) a reasonable child in the child-patient’s position, if warned of the risk, would be inclined to attach importance to it; or (b) the doctor is or reasonably ought to have been aware that the particular child-patient, if warned of the risk, would be inclined to attach importance to it (*Castell v De Greeff* at 426F-G). If consent is given by a child patient who has relied on a false representation of another person, such consent is invalid. When a medical practitioner chooses not to reveal a material risk to the child, consent may not be voluntary unless the non-disclosure falls within the scope of therapeutic privilege (*Castell v De Greeff* at 426). In *SA Medical and Dental Council v McLoughlin* 1948 (2) SA 355 (A) at 366, therapeutic privilege was defined as an ‘exception’ which allows ‘a doctor to withhold from his patient information as to risk if it can be shown that a reasonable medical assessment of the patient would have posed a serious threat of psychological detriment to the patient’.

¹⁵³ *Christian Lawyers Association of South Africa v Minister of Health* 2005 (1) SA 509 (T) para 21.

¹⁵⁴ See P Mahery ‘Consent laws influencing children’s access to health care services’ in P Ijumba and A Padarath (eds) *South African health review* (2006) 167, 169, who argue that it must be clear to both parties that the patient is willing to undergo the suggested medical treatment or surgical operation regardless of the potential risks associated with such treatment or operation.

mentally competent to enjoy autonomy from parental or state control in medical decision-making. In the language of the Children's Act, a child who fails to meet any of these elements does not have 'sufficient maturity and mental capacity to understand the benefits, risks and social implications of the treatment' or operation.

4 EMERGENCIES AND NECESSITY

At common law, a doctor may rely on the defence of unauthorised administration if he or she performs a medical intervention in circumstances where, as a result of shock, delirium, coma or unconsciousness, it is difficult to acquire the patient's consent to such an intervention.¹⁵⁵ For the doctor to rely on this defence, there should be an emergency in the sense of an imminent threat to the patient's life which makes the administration of the intervention urgently necessary to save the patient's life, prevent serious injury or preserve their health. The emergency must be so urgent that it is impossible to delay the intervention for purposes of obtaining consent from the patient or, in the case of incompetent minors, the person authorised to give consent.¹⁵⁶ Section 7(1)(e) of the NHA allows the treatment of a patient without their consent if 'any delay in the provision of the health service to the user might result in his or her death or irreversible damage to his or her health and the user has not expressly, impliedly or by conduct refused that service'. Thus, the intervention should not be against the patient's will in the sense that the doctor should administer the intervention only if the patient or their proxy would have consented to the intervention had they been in a position to do so.¹⁵⁷ If the child patient is capable of giving or refusing informed consent to treatment, their consent must be procured from them regardless of the imminent danger posed by the emergency to their life or health.¹⁵⁸ This follows from the

¹⁵⁵ *Stoffberg v Elliott* at 150 and *Castell v De Greef* at 421.

¹⁵⁶ In *Stoffberg v Elliot* and *Esterhuizen v Administrator, Transvaal*, a two-year life expectancy and a one-year life expectancy were respectively held to be insufficient for purposes of an emergency and sufficient for purposes of obtaining the patient's consent.

¹⁵⁷ In this respect, section 7(1)(e) of the NHA prohibits the provision of emergency treatment where 'the user has expressly, impliedly or by conduct refused that service'. For instance, it will be unlawful for a doctor to administer a blood transfusion to a temporarily unconscious, but otherwise competent adult who would have ordinarily rejected such a transfusion based on his religious beliefs as a Jehovah's Witness.

¹⁵⁸ See MN Slabbert *Medical law in South Africa* (2011) 96.

patient's right to autonomy, particularly a competent patient's right to consent to or refuse treatment or surgery.¹⁵⁹

Today, emergencies are directly regulated by the Children's Act. Section 129(6) thereof provides as follows:

The superintendent of a hospital or the person in charge of the hospital in the absence of the superintendent may consent to the medical treatment of or a surgical operation on a child if-

- (a) the treatment or operation is necessary to preserve the life of the child or to save the child from serious or lasting physical injury or disability; and
- (b) the need for the treatment or operation is so urgent that it cannot be deferred for the purpose of obtaining consent that would otherwise have been required.

Both these requirements should be met for emergency treatment to be lawful under this subsection. In emergencies, the requirements of parental, ministerial or court-ordered consent are bypassed and hospital authorities may treat the child without consent. Not even the consent of the child is necessary in these circumstances.¹⁶⁰ Like its predecessor,¹⁶¹ the Children's Act ensures that the legal requirement of consent is not applied in a manner that delays the treatment of children in emergency situations. In such situations, waiting for the parent or the guardian to give consent to treatment would defeat the purpose of obtaining such consent. Postponing the prescribed treatment or operation in order to receive parental consent would not only announce an undesirable return to the historical focus on family privacy and parental autonomy,¹⁶² but would also be inimical to the best medical interests of the child.¹⁶³ The child may die or suffer

¹⁵⁹ See section 7(1)(e) of the NHA.

¹⁶⁰ See also D McQuoid-Mason 'Parental refusal of blood transfusions for minor children solely on religious grounds — the doctor's dilemma resolved' (2005) 95(1) *South African Medical Journal* 29, 29, where the author argues that 'if medical treatment is necessary to save the child's life, or to prevent it suffering severe physical injury or disability, such treatment will be undertaken without consent'.

¹⁶¹ Section 129(6) of the Children's Act largely reproduces the provisions of section 39(2) of the Child Care Act.

¹⁶² For a discussion on parental autonomy, see generally sections 2.2 of Chapter Two and 6.1 of Chapter Three.

¹⁶³ See sections 4.3 of Chapter Three and 4.3 of Chapter Four.

serious injury or permanent disability. Such an approach would be inconsistent with the constitutional injunction that ‘no one may be denied emergency medical treatment’.¹⁶⁴

Section 129(6) of the Children’s Act is important where the parent or guardian of a child who is seriously ill or cannot for any reason timeously give the prescribed consent for treatment to be administered on their child or where an ordinarily competent adolescent is temporarily incapable of granting such consent. In these circumstances, the medical practitioner is clothed with the authority to decide whether the proposed treatment is necessary to save the child’s life and whether the postponement of the prescribed treatment or operation, for purposes of obtaining consent, would defeat the very reason for such treatment or operation.

Section 129(6) enables health professionals who are ‘on the ground’ to make emergency treatment decisions that promote the child’s best interests and right to life, survival and development. This shows that the best interests of the child remain the primary consideration when making medical decisions in emergency situations.¹⁶⁵ At the centre of the definition of the child’s best interests is the right to life and the need to save the child’s life even without obtaining the consent of the child, parents or the state.¹⁶⁶ The need to protect the child from such imminent dangers as death, grave injury or permanent disability, overrides the autonomy rights of parents, guardians or children.¹⁶⁷ This is consistent with the observation made in earlier chapters that the child’s basic right to life, survival and development is very important in giving meaning to the best interests of the child.¹⁶⁸

The requirement of parental consent to treatment is not to be adhered to in cases of emergencies. There is some bit of direction, from the courts, in this respect. In *Hay v B*,¹⁶⁹ a paediatrician attending to baby R made an urgent application praying the Court to authorise an emergency

¹⁶⁴ Section 27(3) of the Constitution. Section 5 of the NHA also provides that ‘a health care provider, health worker or health establishment may not refuse a person emergency medical treatment’.

¹⁶⁵ See sections 4.3 of Chapter Three and 4.3 of Chapter Four.

¹⁶⁶ See sections 4.2 of Chapter Three and 4.2 of Chapter Four.

¹⁶⁷ Compare with sections 5.2 of Chapter Three and 5.1 of Chapter Four.

¹⁶⁸ See sections 4.3 of Chapter Three and 4.3 of Chapter Four.

¹⁶⁹ 2003 (3) SA 492 (W).

blood transfusion to be administered on the baby. The child's condition was deteriorating¹⁷⁰ and the parents had denied an emergency blood transfusion on the basis of their religious beliefs. Jajbhay J held that in terms of section 28(2) of the Constitution, the best interests principle 'is the single most important factor to be considered when balancing or weighing competing rights and interests concerning children'.¹⁷¹ Besides, the High Court as the upper-guardian of all children had the obligation to protect children.¹⁷² According to the Court, these were the principles that had to be applied in the instant case.¹⁷³

The right to life played an important role in drawing the boundaries of the best interests of the child. Following *S v Makwanyane*,¹⁷⁴ the Court emphasised the 'inviolable' nature of the right to life, insisted that baby R would die imminently if the transfusion were not administered and held that it was in baby R's interests that his right to life be protected.¹⁷⁵ Consequently, the Court held that it was clear that the religious beliefs of R's parents 'negate[d] the essential content of the right' to life as the baby had no chance of survival without the immediate administration of a blood transfusion.¹⁷⁶ Thus, while the parents' concerns were 'understandable', they were 'neither reasonable nor justifiable. Their private beliefs [could] not override baby R's right to life'.¹⁷⁷ Applying the English Court of Appeal's decision in *T (a Minor) (Wardship: Medical Treatment)*,¹⁷⁸ the Court reiterated that the 'paramount consideration...was the welfare of the child and not the reasonableness of the parents' refusal of consent'.¹⁷⁹ The Court held that where it is in the best interests of the child, the High Court as the upper guardian of all minors may order that the child receive medical treatment despite the parents' refusal to consent to such

¹⁷⁰ According to the testimony of the treating physician, it was most probable that if a blood transfusion were not administered, 'baby R would definitely not survive'. At 494E, the applicant is reported to have said that 'there was urgency in the administration of such transfusion and that, if the transfusion were not administered within the next three to four hours, the likelihood of baby R surviving were remote'

¹⁷¹ *Hay v B* at 494I.

¹⁷² *Ibid* at 494J-495A.

¹⁷³ *Ibid* at 495A.

¹⁷⁴ 1995 (3) SA 391 (CC) para 144, where the Constitutional Court held that '[t]here can be no more basic value constitutionally protected than the right to life'.

¹⁷⁵ *Hay v B* at 495B-C.

¹⁷⁶ *Ibid* at 495C-D.

¹⁷⁷ *Ibid* at 495D.

¹⁷⁸ [1997] 1 All ER 906 (CA).

¹⁷⁹ *Hay v B* at 495G. See also M Katz 'The doctor's dilemma: Duty and risk in the treatment of Jehovah's Witnesses' (1996) 85 *South African Law Journal* 484, 484.

treatment.¹⁸⁰ Ultimately, the Court held that ‘the interests of baby R in receiving the blood transfusion outweigh[ed] the reasons advanced by the respondents in opposing the administration of such transfusion’.¹⁸¹

While *Hay v B* was decided before the passage of the Children’s Act, it stands as authority for the view that the state and courts may override parental decisions that threaten the child’s right to life as the right to life is more important than the parent’s religious freedom. Elsewhere, courts have similarly held that a child’s well-being outweighs a parent’s religious freedom and that there is no liberty so sacred that parents can hide behind it to ‘make martyrs of their children’.¹⁸² There is emphasis on child protection over parental autonomy when it comes to life and death decisions concerning children.¹⁸³ The ‘right to life is antecedent to all other rights’¹⁸⁴ and this explains the general reluctance to permit the termination of human life.¹⁸⁵ Thus, courts should override the decisions of parents who reject medical interventions which prevent death or improve the child’s medical condition. This approach is consistent with the gradual movement away from the historical portrayal of children as the property of their parents,¹⁸⁶ particularly as evidenced by sociological theory and the fiduciary model,¹⁸⁷ to the recognition of the child as an individual with separate rights that justify state intervention in the private family.

¹⁸⁰ *Hay v B* at 495H-I.

¹⁸¹ *Ibid* at 496J-496A.

¹⁸² In *Prince v. Massachusetts* 1944 321 U.S. 158 (1944), the US Supreme Court held that ‘[p]arents may be free to become martyrs themselves, but it does not follow that they are free in identical circumstances to make martyrs of their children before they have reached the age of full and legal discretion when they can make choices for themselves’. See also *R v Senior* [1899] 1 QB 283 and *Re O (A Minor) (Medical Treatment)* [1993] 2 FLR 149. In England, courts have also authorised blood transfusions and HIV/AIDS testing of children born of minors in the face of unreasonable refusal of parental consent based on religious values and beliefs. See *Re E: (A Minor)(Wardship: Medical Treatment)* [1993] 1 FLR 386; *Re P (A Minor)(Medical Treatment: Best interests)* 2 All ER 1117 and *Re C (HIV Test)* [1999] 2 FLR 1004.

¹⁸³ See sections 5.2 of Chapter Three and 5.1 of Chapter Four. See also S Woolley ‘Children of Jehovah’s Witnesses and adolescent Jehovah’s Witnesses: What are their rights?’ (2005) 90(7) *Archives of Diseases in Childhood* 715-19, where the author generally argues that parents have no right to refuse life-saving treatment or surgery on behalf of their child based on their (parents’) religious beliefs and values, especially where such refusal places the child’s life and survival in danger.

¹⁸⁴ See *S v Makwanyane* para 326. See also J Fedler ‘Life’ in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz and S Woolman (eds) *Constitutional law of South Africa* 1 ed, RS 2, (1998) 15-1, 15-3 and LS Flicker ‘Acting in the best interest of a child does not mean choosing the best child’ (April 2012) 12(4) *American Journal of Bioethics* 29, 30.

¹⁸⁵ See section 4.3 of Chapter Three and 4.3 of Chapter Four.

¹⁸⁶ See sections 2.1-2.3 of Chapter Two.

¹⁸⁷ See sections 3.1-3.3 and 6.1-6.3 of Chapter Two.

5 STATE INTERVENTION IN MEDICAL DECISION-MAKING

Generally, the state should intervene in the family if the parent or child makes decisions that are not in the child's best interests.¹⁸⁸ There are numerous provisions which limit the medical decisional autonomy rights of children, parents or guardians. The Children's Act provides that children's courts have the jurisdiction to entertain matters relating to 'the protection, well-being and care of a child', including matters concerning medical treatment and surgical operations.¹⁸⁹ Where 'a children's court finds that a child is in need of care and protection', it has the power to 'make any order which is in the best interests of the child'.¹⁹⁰ This includes an order 'that the child receive appropriate treatment or attendance, if needs be at state expense, if the court finds that the child is in need of medical, psychological or other treatment or attendance'.¹⁹¹ The children's court may also issue 'a child protection order which includes an order giving consent to the medical treatment of or to an operation to be performed on, a child'.¹⁹² These provisions empower state agencies and courts to override medical decisions, made by parents or children, if it is in the best interests of the child to do so. Section 129 envisages two forms of state intervention, namely intervention by the Minister of Social Development and by the courts as upper guardians of all minors. These forms of state intervention are considered in turn.

5.1 Ministerial consent to treatment or surgery

The Children's Act empowers the Minister of Social Development to consent to the treatment of or surgical operation on a child in certain circumstances. Section 129 thereof provides as follows:

(7) The Minister may consent to the medical treatment of or surgical operation on a child if the parent or guardian of the child

¹⁸⁸ See sections 4.2 of Chapter Three and 4.2 of Chapter Four. In *V v V* 1998 (4) SA 169 (C) at 189B-C, Foxcroft J held that 'situations may arise where the best interests of the child require that action is taken for the benefit of the child which effectively cuts across the parents' rights'.

¹⁸⁹ Sections 1(1) and 45(1)(a) and (b) of the Children's Act read together.

¹⁹⁰ Section 156(1) of the Children's Act.

¹⁹¹ Section 156(1)(i) of the Children's Act.

¹⁹² Section 46(1)(h)(i) of the Children's Act.

- (a) unreasonably refuses to give consent or to assist the child in giving consent;
- (b) is incapable of giving consent or of assisting the child in giving consent;
- (c) cannot readily be traced; or
- (d) is deceased.

(8) The Minister may consent to the medical treatment of or surgical operation on a child if the child unreasonably refuses to give consent.

It should be noted, at the outset, that these provisions are a significant improvement on the provisions of section 39(1) of the Child Care Act. During the Review of the Child Care Act, section 39(1) was hugely criticised for being ‘impractical’ because it required a medical practitioner to apply for ministerial consent to treatment if the child’s parent or guardian refused to give consent, or could not be found, or was deceased, or was unable to give consent due to a mental illness.¹⁹³ In terms of section 129(7)-(8) of the Children’s Act, applications need not necessarily be made by a medical practitioner. This enables other persons to seek ministerial consent in the instances stated above.

The grounds mentioned in section 127(7)(c) and (d), namely where the child’s parent or guardian is deceased or cannot be traced, are straightforward justifications of ministerial intervention and are not discussed any further below. Section 127(7)(b) authorises the Minister of Social Development to consent to the treatment of or surgery on a child where ‘the parent or guardian of the child is incapable of giving consent or of assisting the child in giving consent’. This ground for ministerial intervention arises from the fact that an incompetent or young child may require the consent or assistance of a parent at a time when the parent’s mental faculties are temporarily clouded due to intoxication, sporadic mental illness or trauma arising from the deteriorating medical condition of the child. The parent’s incapability may arise from the fact that the parent him- or herself may be so ill and incapacitated that they cannot give valid consent to their child’s treatment.¹⁹⁴

¹⁹³ See Discussion Paper on the Review of the Child Care Act, 464, para 11.4.2 and *Report on the Review of the Child Care Act*, 140, para 10.3.1.

¹⁹⁴ See B Taylor ‘Parental autonomy and consent to treatment’ (1999) 29(3) *Journal of Advanced Nursing* 570, 572, arguing there may be serious ‘difficulties in obtaining informed consent from parents who are emotionally traumatised by the recently acquired knowledge that their child has a life-threatening condition’. See also O Eden ‘Consent difficult in paediatric oncology’ (1994) 308 *British Medical Journal* 272, 272, where the author expresses the view that parents cannot make complex decisions ‘at an emotional time’.

Section 127(7)(a) of the Children's Act provides that '[t]he Minister may consent to the medical treatment of or surgical operation on a child if the parent or guardian unreasonably refuses to give consent or to assist the child in giving consent'. This provision is relevant where the child is either under 12 years or is over that age, but lacks the capacity for informed consent. Section 127(7)(a) signifies a revolutionary departure from the public/private divide and its characterisation of the parent-child relationship as an essentially 'private' relationship to be insulated against state intervention.¹⁹⁵ It recognises that parents sometimes act in ways that threaten the rights of children and permits the state to intervene in the family to promote children's health rights.¹⁹⁶ This approach increases public accountability for children and correctly portrays parents as fiduciaries to be 'removed' from the office of parenthood if they act in ways that threaten the child's rights and well-being.¹⁹⁷ As stated in earlier chapters, state intervention arises from the need to protect the child from the unreasonable exercise of parental responsibility.¹⁹⁸ This is another way of saying that children have health rights that are separate from those of other family members and that children's rights stand as reasons for state intervention when parents fail to perform the responsibilities generated by these rights.¹⁹⁹ Accordingly, family privacy and parental autonomy are not inviolable,²⁰⁰ even in the context of the medical treatment of and surgical operations on the very young or the incompetent.²⁰¹

Section 129(8) of the Children's Act permits the Minister to 'consent to the medical treatment of or surgical operation on a child if the child unreasonably refuses to give consent'. This provision is important in the case of adolescents with 'sufficient maturity' to consent to treatment or surgery. Ministerial intervention under section 129(8) arises from the need to prevent the child

¹⁹⁵ See section 2.4 of Chapter One and 6.2 of Chapter Three.

¹⁹⁶ See sections 3.3, 4.3 and 5.3 of Chapter Two. See also sections 6.2 of Chapter Three and 6.3 of Chapter Four.

¹⁹⁷ See sections 3.3 and 4.3 of Chapter Two. See also sections 6.2 of Chapter Three and 6.3 of Chapter Four.

¹⁹⁸ See sections 2.4 of Chapter One and 3.3, 4.3 and 5.3 of Chapter Two. See also sections 6.2 of Chapter Three and 6.3 of Chapter Four.

¹⁹⁹ See sections 2 and 3 of Chapter Three. See also sections 2 and 3 of Chapter Four.

²⁰⁰ See sections 6.2 of Chapter Three and 6.2-6.3 of Chapter Four.

²⁰¹ In England, courts have authorised blood transfusions and HIV/AIDS testing of children born of minors in the face of unreasonable refusal of parental consent based on religious values and beliefs. See *Re E: (A Minor)(Wardship: Medical Treatment)* [1993] 1 FLR 386; *Re P (A Minor)(Medical Treatment: Best interests)* 2 All ER 1117 and *Re C (HIV Test)* [1999] 2 FLR 1004.

from exercising autonomy rights in ways that threaten the very child's health rights.²⁰² As shown in earlier chapters, children are not the best persons to be entrusted with their own protection and may exercise their autonomy rights in ways that are detrimental to their best interests,²⁰³ sometimes with total parental approval. Unlike the Sterilisation Act which does not refer to the need both to listen to children and seek their consent to relevant medical procedures, the Children's Act only takes decisions away from the child if the child concerned is either incompetent to make the decision or unreasonably refuses to give consent to the relevant medical interventions.

In terms of the fiduciary model and the theory of paternalism, the lack of intellectual maturity on the part of children is the primary reason for subjecting them to the continuous managerial power of others, including the state.²⁰⁴ Further, the codification of child protection rights at the international and domestic levels is meant to ensure that the state protects the child against personal decisions that are not in their best interests.²⁰⁵ As rights and general principles, the best interests of the child²⁰⁶ and the right to life, survival and development,²⁰⁷ are also designed to ensure that children do not exercise autonomy in ways that are detrimental to their life, health and well-being. When inspired by the child's 'unreasonable' refusal of treatment or surgery, ministerial consent to such treatment or surgery symbolises the fact that the child's autonomy rights are not absolute and may be limited to promote the very child's best interests and right to life.

The Children's Act does not spell out what amounts to unreasonable refusal of consent. Generally, the question of whether refusal is unreasonable depends on the level of invasiveness of the proposed surgical operation and its anticipated benefits. A parent's refusal to assist an adolescent (who is on the verge of attaining majority status) to undergo a minor surgical operation with clear health benefits and limited or no known health risks is likely to be deemed unreasonable. In such circumstances, the child would be capable of making decisions that are in

²⁰² See sections 3.3, 4.3 and 5.3 of Chapter Two.

²⁰³ See sections 3.2, 4.2 and 5.2 of Chapter Two; 5.2 of Chapter Three and 5.1 of Chapter Four.

²⁰⁴ See sections 3.1 and 4.1 of Chapter Two.

²⁰⁵ See sections 5.2 of Chapter Three and 5.1 of Chapter Four.

²⁰⁶ See sections 4.2 of Chapter Three and 4.2 of Chapter Four.

²⁰⁷ See sections 4.3 of Chapter Three and 4.3 of Chapter Four.

their best interests and the Minister or the court should assist the child to undergo the relevant operation.

Even if the proposed surgery is very invasive and involves great risks, the nature of the risks and level of invasiveness involved should be measured against the health benefits that will accrue to the child and the cost (measured in terms of levels of pain involved and general deterioration of the medical condition) associated with foregoing surgery.²⁰⁸ If the parent refuses potentially life-saving treatment or surgery (contrary to medical advice) on behalf of a child whose condition is deteriorating rapidly, such refusal is likely to be considered unreasonable, especially if there is consensus, among medical practitioners, that the proposed treatment is very effective and the health benefits are clear.²⁰⁹ The need to promote the child's best interests²¹⁰ and basic right to life no doubt outweighs any counterclaims of parental autonomy.

Parents and children may not enjoy their religious freedom in a manner that threatens the child's best interests and right to life.²¹¹ Fortunately, the Children's Act now expressly outlaws parental refusal of treatment or surgery based on religious beliefs 'unless that parent or guardian can show that there is a medically accepted alternative choice to the medical treatment or surgical operation concerned'.²¹² The Children's Act does not directly address the question of whether a child's refusal of treatment, based on religion, is unreasonable and therefore capable of limitation.²¹³ There is foreign authority for the view that competent minors should be allowed to

²⁰⁸ See U Kilkelly *The child and the European Convention on Human Rights* (1999) 150, citing *JR, GR, RR & YR v Switzerland* No 22398/93 Dec 5//95, DR 81, at 61, where it was held that '[c]ompulsory treatment will not infringe the Convention as long as there is proportionality between the interference which it creates and the need to protect the public interest which it serves. This has been found to be particularly important where children are concerned, because they have limited possibilities to protect their own rights'.

²⁰⁹ This is particularly so if the medical matters in question involve complex diseases, processes and procedures in respect of which an ordinary parent lacks the competence to understand. A parent who ignores the deteriorating medical condition of the child or disregards the imminent dangers of refusing treatment can hardly be said to be behaving reasonably. Refusal is also unreasonable if it is based solely on the parents' sense of entitlement that the child is 'theirs' (the child as property argument) or general lack of trust in the medical profession or religious beliefs which offer no medically acceptable alternative choice to the proposed treatment or operation.

²¹⁰ See sections 4.2 of Chapter Three and 4.2 of Chapter Four.

²¹¹ Sections 4.3 of Chapter Three and 4.3 of Chapter Four.

²¹² Section 129(10) of the Children's Act.

²¹³ This scenario is common where children and parents jointly make uninformed decisions based solely on shared religious practices and beliefs. See KD Van Bogaert 'Ethics and medicine: Jehovah's Witness and the new blood transfusion rules' (2013) 55(1) *South African Family Practice* 6; KD Van Bogaert 'Ethics and medicine: Revisiting the Children's Act and the implications for health care practitioners' (2013) 55(1) *South African Family Practice* 2; R Gillon 'Refusal of potentially life-saving blood transfusions by Jehovah's Witnesses: Should doctors explain that

refuse medical treatment and surgery,²¹⁴ even on the basis of religion. In *Re G*,²¹⁵ the Illinois Supreme Court held that a mature minor has a right to reject medical treatment, life-saving or otherwise, based on religious grounds.²¹⁶ There are many reasons for doubting that this approach will ever be adopted by local courts, at least in the foreseeable future. Given the centrality of the right to life in international and domestic law,²¹⁷ it does not seem to matter that the religion-based refusal of treatment or surgery has been made by the child or that the child's refusal will lead to his or her own death or that the child's life has been threatened by the child him- or herself.

If a child refuses potentially life-saving treatment, such refusal would be 'unreasonable' and invite state intervention under the Children's Act. Despite a mature minor's 'competent objection' to the proposed intervention, it would be in the best interests of the minor for medical practitioners to impose life-saving treatment on them.²¹⁸ There is extensive foreign²¹⁹ and

not all JWs think it is religiously required?' (2000) 26(5) *Journal of Medical Ethics* 299; and O Muramoto 'Bioethics of the refusal of blood by Jehovah's Witnesses: Part 3, A proposal for a don't ask don't tell policy' (1999) 25(6) *Journal of Medical Ethics* 463.

²¹⁴ See *R (Burke) v General Medical Council* (2004) 2 FLR 1121, 1197, where Munby J once observed that 'in the final analysis, it is for the patient, if competent, to determine what is in his own best interests'. However, this decision has been reversed, wrongly perhaps.

²¹⁵ *In Re E.G., a Minor*, 133 Ill. 2d 98 (1989).

²¹⁶ *Ibid*, at 109-111. The court held that EG, a 17-year old minor, was mature enough (based on a standard of proof of clear and convincing evidence) to make the decision to refuse treatment, even if refusal results in the minor's death, based on the common law right to consent to or refuse treatment. While the Court acknowledged the state's interests in preserving life, preventing suicide, promoting the moral integrity of the medical profession and the interests of others, it held that a competent minor's right to refuse treatment outweighs these interests.

²¹⁷ See sections 4.3 of Chapter Three and 4.3 of Chapter Four.

²¹⁸ See sections 4.2 of Chapter Three and 4.2 of Chapter Four. In this respect, it is necessary to refer, at length, to Balcombe LJ's findings in *Re W (a minor) (medical treatment: court's jurisdiction)* [1992] 2 FCR 785 at 510, [1993] Fam 64 at 88:

Undoubtedly, the philosophy...is that, as children approach the age of majority, they are increasingly able to take their own decisions concerning their medical treatment. In logic there can be no difference between an ability to consent to treatment and an ability to refuse treatment...Accordingly, the older the child concerned the greater the weight the court should give to its wishes, certainly in the field of medical treatment. In a sense this is merely one aspect of the application of the test that the welfare of the child is the paramount consideration. It will normally be in the best interests of a child of sufficient age and understanding to make an informed decision that the court should respect its integrity as a human being and not lightly override its decision on such a personal matter as medical treatment, all the more so if that treatment is invasive...*Nevertheless, if the court's powers are to be meaningful, there must come a point at which the court, while not disregarding the child's wishes, can override them in the child's own best interests, objectively considered. Clearly such a point will have come if the child is seeking to refuse treatment in circumstances which will in all probability lead to the death of the child or to severe permanent injury.*

domestic authority for this view. In its *Report on Euthanasia and the Artificial Preservation of Life*, the SALRC observed that respect for autonomy ‘is not an overriding value’ in end-of-life decision-making by adolescents and emphasised the importance of the best interests of the child.²²⁰ Further, the SALRC emphasised that many children were not *compos mentis*, that there was a rational distinction to be made between giving or withholding consent to treatment and that it was prudent to limit children’s right to refuse treatment, ‘as a safety measure’, since refusal could be detrimental to the child’s life and health.²²¹ These observations demonstrate that decisions that threaten the child’s right to life are likely to be regarded as ‘unreasonable’ and to attract state intervention under the Children’s Act.

5.2 Court-ordered consent to treatment or surgery

The High Court and, of late, the children’s court have residual powers to order that medical interventions be administered on children. In South Africa, the case of *Hay v B*, discussed above, demonstrates that courts have the power to overturn parental decisions that are inconsistent with the best medical interests of the child or threaten the child’s right to life.²²² Historically, the High Court as upper guardian of all minors had the power to interfere with the exercise of parental

²¹⁹ See, for example, *Re J (wardship: medical treatment)* [1991] 2 WLR 140 and *Re B (A minor) (Wardship: Medical treatment)* [1981] 1 WLR 1421 and *Re M (Child: Refusal of medical treatment)* [1999] 2 FCR 577, where the health professionals were permitted to carry out a heart transplant on a 15-year old who had refused to undergo surgery. The risks associated with the refusal of surgery and the risks emanating from surgery had to be set against ‘not simply the risk, but the certainty of death’.

²²⁰ See SALRC *Report on Euthanasia and the Artificial Preservation of Life* (Project 86, 1998) 48, para 4.31. See also SALRC, *Euthanasia and the Artificial Preservation of Life*, Discussion Paper 71 (Project 86, 1997) 18, para 3.24, proposing that only competent persons who are 18 years and above be allowed to refuse treatment.

²²¹ See SALRC, *Report on Euthanasia and the Artificial Preservation of Life*, 48-49, paras 4.30 and 4.31, and SALRC, Discussion Paper on the Review of the Child Care Act, 488, stating that ‘[t]he Commission is of the view that there is a rational distinction to be made between giving consent and withholding consent and that it is right for the law to be reluctant to allow a child to veto treatment designed for his or her benefit, particularly if a refusal will lead to the child’s death or permanent damage’. See also J Pearce ‘Consent to treatment during childhood: The assessment of competence and avoidance of conflict’ (1994) 165(6) *The British Journal of Psychiatry* 713, 713, where the author argues as follows:

The consequences of withholding consent to treatment are usually much more significant and potentially dangerous than simply giving consent... Thus it can be argued that refusing to give consent is a higher order of decision-making than merely giving consent. A more stringent test should therefore be applied when assessing a child’s ability to refuse consent than when assessing the competence to consent. This approach allows a child to learn about giving consent before progressing on to the potentially dangerous and highly responsible decision to withhold consent.

²²² See section 3.3 of this chapter.

authority over the child.²²³ As shown in Chapter Four, this power has now been largely codified in several legislative instruments, especially the Children's Act.²²⁴ Section 129(9) of the Children's Act provides that '[t]he High Court or children's court may consent to the medical treatment of or a surgical operation on a child in all instances where another person that may give consent in terms of this section refuses or is unable to give such consent'. These courts have the power to override the decisions made by parents, children and the Minister of Social Development should any of these persons refuse to give consent or be unable to consent for any reason.

Section 129(9) reinforces the idea that the power to consent to treatment or surgery should be exercised in the best interests of the child and the courts should override any refusal of treatment or surgery which is meant to save the child's life, prevent injury or permanent disability. It underlines the significance of the best interests of the child²²⁵ and shows that whoever has responsibility for making medical decisions affecting children should respect and promote the child's right to life.²²⁶ Given that several persons may grant consent to the medical treatment of or surgical operation on the child, the residual powers of the courts are rarely exercised in practice, but may be important where there is conflict between parents, the child and medical practitioners.

Finally, the courts' powers are not limited to instances where parents, children or other persons refuse or are unable to give consent. If the parent or the child consents to a procedure that is to the detriment of the child (non-therapeutic sterilisation, for instance), courts are entitled to disregard their views.²²⁷ The fact that non-therapeutic sterilisation is not intended to cure any medical condition and may have far-reaching and irreversible implications for the child's

²²³ Section 6.1 of Chapter Four.

²²⁴ Section 6.3 of Chapter Four.

²²⁵ See sections 4.2 of Chapter Three and 4.2 of Chapter Four.

²²⁶ See sections 4.3 of Chapter Three and 4.3 of Chapter Four.

²²⁷ In *Re D (A Minor) (Wardship: Sterilisation)* [1976] Fam 185, Heilbron J reversed a widowed mother's decision to have her mentally challenged 11-year old daughter sterilised. In the court's opinion, the procedure was not in the child's best interests, since it involved an irreversible procedure of a non-therapeutic nature; which would entail the deprivation of a basic human right to reproduce. Medical examinations had indicated that her condition was improving and that she might, at some future time, acquire the capacity to make an informed choice about the procedure. In the end, it was not considered a matter which fell within a doctors' sole clinical judgment and the court had to intervene.

capacity to reproduce, partly explains why children have been statutorily denied the legal capacity to undergo sterilisation before attaining majority status.²²⁸ Where, for instance, a medical practitioner believes that treatment or surgery is necessary, but the parent and the child agree otherwise, courts may have to endorse the clinical judgment of the medical profession in order to protect the best medical interests of the child. Courts may also intervene in the child's best interests when there is disagreement between parents, or between parents and health professionals, about the proposed medical intervention.²²⁹ Further, parent-child disputes on whether the child possesses the requisite competence to make certain treatment decision independently are likely to end up in the courts which are bound to make decisions that advance the child's best interests and basic right to life, survival and development.

6 CONCLUSION

This chapter has demonstrated that an adolescent who possesses 'sufficient maturity and mental capacity to understand the benefits, risks and social implications of medical treatment' may consent to such treatment without parental approval. In the case of surgical operations, a competent child still needs parental assistance, but ministerial or court-ordered consent suffices if the parent unreasonably refuses to assist the child. The Children's Act substantially erodes parental control over health care decisions in respect of children. It authorises competent children to assert their autonomy rights against parents or guardians. These developments reflect an 'evolutionary revolution' from parental rights to both the individual rights of children and responsibilities of parents. They also symbolise a departure from the historical portrayal of children as 'property' and characterise children as ends entitled to determine their own destiny. This drive towards autonomy is not only evident in the reduction of the age of consent to medical procedures, but also in the idea that competent adolescents may refuse medical interventions if such refusal does not necessarily cause death, serious injury or permanent disability.

²²⁸ See sections 2.2 of Chapter Six and sections 2 and 3 of the Sterilisation Act.

²²⁹ See L Hagger *The child as vulnerable patient* (2009) 55, 59. See also *R v Portsmouth Hospitals NHS Trust ex parte Glass* [1999] 2 FLR 905.

Parents have the primary responsibility to consent to or refuse medical treatment and surgical operations on behalf of children who are either below the age of 12 years or over that age, but lacking ‘sufficient maturity’ to understand the nature, risks and benefits of the proposed intervention. In these cases, parental responsibility arises from the need to promote the child’s best interests and protection rights, particularly the right to life, survival and development. This approach is important for the protection of children experiencing moderate to severe intellectual developmental delay. However, participation rights remain important even for children lacking the capacity to give informed consent to treatment or surgery. These children should still be heard and have their views given due weight in medical decision-making. Thus, the Children’s Act emphasises the importance of giving children meaningful opportunities to be heard, even where such children lack the capacities for rational action.

More importantly, the child’s best interests and right to life justify state intervention whenever children and parents unreasonably refuse medical treatment or surgery. This signifies a revolutionary departure from the public/private divide and its characterisation of the parent-child relationship as an essentially ‘private’ relationship to be insulated against state intervention. It recognises that parents sometimes act in ways that threaten the rights of children and permits the state to intervene in the family to promote children’s health rights. These principles prevent the making of decisions that are detrimental to children and permit the state to overturn medical decisions that may cause death, serious injury or permanent disability. They recognise the intrinsic nature of the right to life and its role in determining the scope of child autonomy, parental responsibility and state intervention in decision-making.

This chapter identified two inadequacies of the current legal framework regulating consent to medical treatment and surgical operations. First, it demonstrated that in comparative terms, the age of consent is very low. This problem becomes more acute if a 12 year old is deemed competent to make an informed refusal of life-sustaining treatment, especially if the child is an orphan or living in a child-headed household or in the streets. The chapter further relied on brain science research and the sociology of childhood to demonstrate the correctness of the claim that 12 years is too low an age for the majority of South African children to have attained the ability to make informed medical decisions. It has been shown that parts of the brain responsible for

high order or executive cognitive functions such as controlling impulses, calming emotions, prioritising thought, imagining and informing considered and rational decision-making, continue to develop steadily through adolescence and young adulthood (18-25 years). This places doubt on the correctness of the statutory ordination of 12 years as the age at which children attain capacities for rational autonomy. Besides, group solidarity in South Africa's communitarian societies and cultures has not only been shown to affect the child's capacity or willingness to exercise decisional autonomy rights early in the life course, but to make the need to listen to children less imperative.

Another related challenge is that the terms 'sufficient maturity and mental capacity' are not defined in the Children's Act and it is not at all clear what criteria or guidelines should be used to determine whether the child possesses these attributes. Finally, it is not clear who makes the decision on whether the child possesses 'sufficient maturity and mental capacity' to make independent decisions. If this call is made by medical practitioners, then there is a real conflict of interest because the same doctor who should not proceed without the child's informed consent to treatment determines whether the child possesses 'sufficient maturity and mental capacity' to give informed consent to such treatment. Besides, the fact that doctors are not specifically trained to make capacity determinations compromises the reliability of the prevailing legal framework. This chapter has provided some guidelines for capacity determinations and suggested that the terms 'sufficient maturity and mental capacity' should be tied to the doctrine of informed consent. On the whole, the Children's Act does already support the legal framework proposed in this study in that it provides for a specific age of consent (albeit at a lower age) and informed consent, especially in the context of routine medical treatment and surgical operations. My concern in relation to the provisions regulating consent to general medical treatment and surgery is only limited to the stipulated age consent.

CHAPTER SIX: BALANCING CHILDREN’S AUTONOMY, PARENTAL RESPONSIBILITY AND STATE INTERVENTION IN REPRODUCTIVE DECISION-MAKING UNDER SOUTH AFRICAN LAW

1 INTRODUCTION

Chapter Five discussed the circumstances in which the child or parent may make general medical decisions and the grounds upon which the state may veto such decisions if they are inconsistent with the child’s best interests. This chapter examines the interface between children’s autonomy, parental responsibility and state intervention in medical decisions of a specific type, namely reproductive decisions. Reproductive decision-making includes, among others, matters relating to sterilisation, contraception and abortion. Reproductive autonomy revolves around ‘the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children’.¹

In Chapter One,² this study explained that the primary reason for locating the discussion in the medical and reproductive decision-making context is that uniformed decisions, with or without the support of the parents, often carry heavy consequences for the health and the life of the child. This theme was followed up in the introductory section of Chapter Five.³ More importantly, the non-use or improper use of contraceptives by sexually active minors may lead to the contraction of sexually transmitted diseases (STDs), unintended teenage pregnancies, unsafe abortion and denial of access to education opportunities. These possibilities threaten the life, survival and development of sexually active adolescents.⁴ It is therefore necessary to investigate whether the domestic regulation of this field of the law is in keeping with the best interests of the child. There are further reasons for choosing contraception and abortion as some of the focus areas of this

¹ International Conference on Population and Development (ICPD), *Summary of Programme of Action*, DPI/1618/POP United Nations Department of Public Information, Conference held in Cairo on 5-13 September 1994, Chapter Seven, para A.

² See section 5 of Chapter One.

³ See section 1 of Chapter Five.

⁴ See section 5 of Chapter One.

study. These areas divide parents, lawyers, philosophers and even health care professionals on what is legally or morally right for children. Children asserting autonomy in reproductive decision-making often confront counterclaims of legitimate intervention by parents or guardians responsible for caring for the child.

Many adults believe that children should abstain from sex or that they are sexually innocent. These beliefs are inconsistent with the reality that sexually active minors do participate in sexual activities of different sorts without the knowledge of parents.⁵ It must be emphasised that this chapter is not concerned with the question whether or not minors should have sex (sexually active minors participate in sexual activities regardless of what parents and the law say). Rather, it seeks to investigate the extent to which South African law protects and empowers sexually active adolescents who engage in sexual activities earlier than society anticipates them to. This involves an analysis of the degree to which relevant legislation incorporate or disregard the principles discussed in earlier chapters in the context of contraception and the termination of pregnancy (also referred to as abortion). Accordingly, this chapter focuses on whether or not the Children's Act⁶ and the Choice on Termination of Pregnancy Act (Choice Act)⁷ strike an

⁵ See C Campbell, Y Nair and S Maimane 'AIDS stigma, sexual moralities and the policing of women and youth in South Africa' (2006) 83 *Feminist Review* 132, 133-34; P Mda, D O'Mahony, P Yogeswaran and G Wright 'Knowledge, attitudes and practices about contraception amongst schoolgirls aged 12-14 years in two schools in King Sabata Dalindyebo Municipality, Eastern Cape' (2013) 5(1) *African Journal of Primary Health Care and Family Medicine* 1, 4, where the authors observed that '[m]ost participants agreed that parents were not happy with young girls being involved in relationships. Some mentioned that their mothers shouted at them whenever they talked about sexual matters and they did not like that'; and D Brand 'Sugar, spice and criminalised consent: A feminist perspective of the legal framework regulating teenage sexuality in South Africa' (2013) 29 *South African Journal on Human Rights* 193, 197-98, who argues as follows:

Young women are culturally-set beacons of sexual innocence, gatekeepers of sexual activity and bearers of the moral and physical consequences related to teenage sexuality. Yet, there is public anxiety about the potentially corrupting effects of sexual knowledge. In spite of the anxiety about teenage sexuality, sex is still a potent social force fuelled by the particular circumstances of teenagers' lives....South African girls also exist in a social environment of violence, poverty and disease as well as the *stigmatisation of the sexuality of women and young people*. Many parents, guardians and community leaders will not acknowledge the possibility of youth sexuality or the fact that their own children may be sexually active. The denial of teenage sexual desire is particularly strong in relation to girls and is related to the lack of respect for adult women's sexual autonomy as well as the wider demonisation of women. Within communities the 'weakness of women' is believed to fuel the spread of HIV/AIDS in a social context where women are responsible for promoting sexual morality. Nonetheless, young women remain sexually active, despite adult attempts to control their behaviour and, in order to fulfil their potential as fully-fledged adults, first they need to navigate their way through adolescence.

⁶ Act 38 of 2005.

⁷ Act 92 of 1996.

appropriate balance between children's autonomy, parental responsibility and state intervention in reproductive decision-making.

Contraception and the termination of pregnancy raise sensitive moral, philosophical and legal questions concerning the degree to which children, particularly girls, should be allowed to determine how to use their own bodies. First, whilst the child's best interests, right to life and privacy may be promoted by giving children relative autonomy from parental control, many parents or guardians prefer to retain control over the child's reproductive decisions. Second, even if it were accepted that parents or guardians should make reproductive decisions for sexually active adolescents, it would be difficult to monitor children's compliance with parental decisions, even where parents make decisions that are in the child's best interests.⁸ Third, the reproductive autonomy of children, particularly girls, comes across in a way that is so different from other fields of the law.⁹ For instance, it is difficult to justify the practical challenges and psychological pain experienced by a pregnant minor who has been forced to carry a pregnancy leading to the birth of a child whom she will not be able to support.¹⁰ These challenges portray reproductive decision-making as an area in which sexually active adolescents are better protected by expanding rather than limiting their autonomy. Starting with contraception, this chapter examines the degree to which the legal framework governing access to reproductive health services addresses some of these challenges.

⁸ For instance, a child forced to carry her pregnancy to term in the third trimester may utilise the services of a backstreet abortionist. Similarly, parents, society and the state would face difficulties in monitoring children's compliance with, for instance, a statutory provision requiring sexually active adolescents to use condoms and oral or injectable contraceptives.

⁹ In *Casey v Planned Parenthood of South Eastern Pennsylvania* (1992) 120 L ed 2d 674 (hereafter *Casey v Planned Parenthood*) at 698-99, O'Connor J, for the US Supreme Court, held as follows:

Abortion is a unique act...That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear.

¹⁰ See *Roe v Wade* (1972) 35 L ed 2d 147 (hereafter *Roe v Wade*) at 177, where the Court held:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether, is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, the additional difficulties and continuing stigma of unwed motherhood may be involved.

2 CONTRACEPTION

Under the Child Care Act, access to contraception fell under the scope of medical treatment, so that only children aged 14 years or older had the right of access to contraceptives.¹¹ Today, access to contraceptives is regulated by the Children's Act. In terms of the Children's Act, there are two categories of contraception (condoms and contraceptives other than condoms) and each category is governed by different statutory rules.¹² In this way, the Children's Act significantly improves on the provisions of the Child Care Act as the latter did not dedicate specific provisions to access to contraceptives by children. The discussion starts with an analysis of the provisions governing access to condoms.

2.1 Access to condoms

Section 134(1) of the Children's Act governs the sale or distribution of condoms to children and its provisions apply to both male and female condoms. It provides that 'no person may refuse (a) to sell condoms to a child over the age of 12 years; or (b) to provide a child over the age of 12 years with condoms *on request* where such condoms are provided or distributed free of charge'.¹³ The fact that no person may refuse to sell or provide condoms to children implicitly means that every child has a right to buy, request for and use condoms as they deem fit. The phrase 'no person may refuse to sell condoms to a child over 12 years' imposes on the relevant persons the duty to sell condoms to every child in need of them. Thus, a person who is selling or distributing condoms is not bound to distribute condoms to children below the stipulated age.

¹¹ See section 39(4)(b) of the now repealed Child Care Act.

¹² Section 134 of the Children's Act provides as follows:

- (1) No person may refuse to sell condoms to a child over the age of 12 years; or provide a child over the age of 12 years with condoms on request where condoms are provided or distributed free of charge.
- (2) Contraceptives other than condoms may be provided to a child on request by the child and without the consent of the parent or care-giver of the child if—
 - (a) the child is at least 12 years of age;
 - (b) proper medical advice is given to the child; and
 - (c) a medical examination is carried out on the child to determine whether there are any medical reasons why a specific contraceptive should not be provided to the child.

¹³ Section 134(1) of the Children's Act.

The child's right to use condoms does not depend on whether the child possesses 'sufficient maturity and mental capacity' to understand the nature, benefits and risks associated with condom use. Once the child reaches the age of 12 years, they are presumed to understand the benefits associated with using condoms. This recognises the reality that young children engage in unprotected sex and need to be protected from STDs or unwanted pregnancies from the onset of puberty. With most girls and some boys, the age of 12 years coincides with the onset of puberty, marks the development of sexual consciousness and sometimes corresponds with the child's engagement in varying levels of sexual experimentation.¹⁴ These factors explain why the Children's Act refers to 12 years as the stage at which children become entitled to buy, request for or use condoms.

Where condoms are distributed free of charge, such condoms should be given to the child 'on request' by the child. This phrase demonstrates that the choice on whether or not to use condoms belongs to the child and not parents or the state. Apart from placing children at the centre of the reproductive decision-making process, this provision prevents the exercise of paternalism over children who have reached the statutory age of consent and allows children to take responsibility for the exercise of their rights. Given the great levels of intimacy and privacy that characterise the circumstances in which condoms are used,¹⁵ it is not even practical to insist on parental guidance in this field of the law.

More importantly, however, provisions regulating the use of condoms and other contraceptives constitute a unique form of state regulation of the parent-child relationship in a way that protects the child from potential harm. The relevant provisions fall under the banner of protective measures relating to children's health care rights.¹⁶ Statutory provisions governing the use of

¹⁴ See D Bhana 'The (im)possibility of child sexual rights in South African children's account of HIV/AIDS' (2006) 37(5) *Institute of Development Studies Bulletin* 64, 66, where the author, based on empirical research, 'observes that children as young as seven and eight years old are neither ignorant nor innocent about matters of sexuality and HIV/AIDS. The author demonstrates that children's knowledge concerning 'condoms does not simply break the myth of childhood innocence, but also provides young children with awareness of the safety that the condom is supposed to provide against HIV/AIDS'. See also A Viviers, G Clacherty and A Maker 'Children's experiences of participation' in L Jamieson, R Bray, A Viviers, L Lake, S Pendlebury and C Smith (eds) *South African Child Gauge* (2010-2011) 59, 63, where the authors argue that children have demonstrated broad awareness on matters concerning sexuality, condom use and teenage pregnancies.

¹⁵ See sections 5.3.2 of Chapter Three and 5.3.1 of Chapter Four.

¹⁶ See section 5.1 of Chapter Four.

condoms by adolescents were designed to respond more effectively to current challenges such as teenage pregnancies and the lower age of sexual debut amongst adolescents.¹⁷ In 2001, the National Department of Health found that many young people were having sex well before the age of 14 years.¹⁸ Accordingly, the liberalisation of laws regulating the distribution of condoms appears to be driven by the need to curb the spread of HIV/AIDS and other venereal diseases.¹⁹

For the reasons stated above, the state would rather extend to adolescents the right to buy or request for and use condoms even if, strictly speaking, such children may lack the legal capacity to consent to sexual intercourse, than refuse to sell or distribute such condoms to sexually active adolescents and risk the possibility that such children will have unprotected sexual intercourse. In the context of access to condoms, the child's best interests and right to life are better saved by extending decisional autonomy to children who engage in risky sexual behaviour at earlier ages. Therefore, the child's protection rights ground individual autonomy instead of justifying parental or state paternalism over children.²⁰ This is inconsistent with the recurrent claim that the best way to protect children is not to abandon them to their autonomy.²¹ However, the need to prevent the spread of STDs and to prevent unwanted pregnancies suggests that the child's best interests²² and right to life, survival and development²³ are promoted by allowing sexually active minors access to condoms.

2.2 Access to contraceptives other than condoms

Access to contraceptives other than condoms is also regulated by the Children's Act. Section 134(2) of the Children's Act provides as follows:

Contraceptives other than condoms may be provided to a child on request by the child and without the consent of the parent or care-giver of the child if—

¹⁷ D Kassin and P Mahery 'Special child protective measures in the Children's Act' in T Boezaart (ed) *Child law in South Africa* (2009) 185, 221.

¹⁸ National Department of Health 'Policy guidelines on youth and adolescent health' (2001) 37.

¹⁹ See D McQuoid-Mason 'The effect of the new Children's Act on consent to HIV testing and access to contraceptives by children' (2007) 97(12) *SAMJ* 1252, 1253.

²⁰ See, however, sections 5.2 of Chapter Three and 5.1 of Chapter Four.

²¹ See sections 3.3, 4.3 and 5.3 of Chapter Two.

²² See sections 4.2 of Chapter Three and 4.2 of Chapter Four.

²³ See sections 4.3 of Chapter Three and 4.3 of Chapter Four.

- (a) the child is at least 12 years of age;
- (b) proper medical advice is given to the child; and
- (c) a medical examination is carried out on the child to determine whether there are any medical reasons why a specific contraceptive should not be provided to the child.²⁴

The introductory part of section 134(2) pits the child's right to be provided with contraceptives on demand against the parent's (caregiver's) negative duty to respect the child's choice. It challenges the public/private dichotomy's characterisation of the parent-child relationship as a private matter and permits the state to promote the health care rights of children within the 'private family'.²⁵ In this way, section 134(2) embodies one of the clearest examples of the movement away from the twin concepts of family privacy and parental autonomy to the idea of children's rights in reproductive decision-making.²⁶ This assertion is supported by the fact that there is no requirement that adolescents possess 'sufficient maturity and mental capacity' in order to make independent decisions on contraception. Decision-making capacity is presumed.

There are three conditions attached to the child's right to be provided with contraception on demand. First, the child must be 'at least 12 years of age'. Implicitly, children under 12 years of age would need parental guidance in order to use contraceptives effectively. From 12 years on, children are legally presumed to be competent to use contraceptives independently. There is no room, whatsoever, for parents to control the child's decision to request for contraception. However, the fact that contraception is a form of medical treatment brings into question the effectiveness of using age as the sole criteria for conferring decisional autonomy on children. This query is discussed fully below.²⁷

Second, the child should have been given 'proper medical advice' before she is provided with particular contraceptives. The term 'proper medical advice' is not defined in the Children's Act. Read with the child's right to access to information,²⁸ the term 'proper medical advice' underlines the significance of disclosure of health-related information for purposes of enabling

²⁴ Section 134(2) of the Children's Act.

²⁵ See sections 2.4 of Chapter One and 6.1 of Chapter Three.

²⁶ See sections 6.2 and 6.3 of Chapter Four.

²⁷ See section 2.3 of this chapter.

²⁸ See sections 5.3.3 of Chapter Three and 5.3.3 of Chapter Four.

the doctor and the child to choose the most suitable contraceptive intervention. Section 134(2)(b) ties in well with health care providers' statutory duty to inform patients, including children, of (a) their health status; (b) the range of diagnostic procedures and contraceptive treatment options available to them; and (c) the benefits, risks and consequences generally associated with each treatment option.²⁹ Proper medical advice to the child encourages meaningful participation and enables children to make informed contraceptive choices.³⁰ Lack of information on sexual health violates adolescents' rights to information, health, life and bodily integrity.³¹ To this end, the term 'proper medical advice' is meant to encourage the provision of health-related information to enable adolescents to exercise informed reproductive choices.

The third condition attached to the child's access to contraception is that 'a medical examination' should have been 'carried out on the child to determine whether there are any medical reasons why a specific contraceptive should not be provided to the child'.³² This provision seeks to protect children from the harm that may emanate from contraceptive treatment which is not in their medical interests. A child may not, for instance, exercise their reproductive autonomy by choosing a contraceptive option which aggravates any other medical condition which they may be suffering from.³³ This argument is based on the role played by the child's protection rights,³⁴ particularly the right to life,³⁵ and the best interests of the child,³⁶ in limiting children's autonomy rights. Therefore, section 134(1)(c) seeks to ensure that children make contraceptive treatment decisions that are consistent with their best interests and basic right to life.

Access to contraceptives by children serves to protect them from unprotected sex, the spread of sexually transmitted diseases, unintended pregnancies and unsafe abortions. In *Teddy Bear*

²⁹ Section 6(1) of the National Health Act 61 of 2003.

³⁰ See sections 5.3.3 of Chapter Three and 5.3.3 of Chapter Four. For comparative jurisprudence, see Committee on the Rights of the Child, *General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child* CRC/GC/2003/4 para 26.

³¹ E Durojaye 'Access to contraception for adolescents in Africa: A human rights challenge' (2011) XLIV *Comparative International Law Journal of South Africa* 1, 7.

³² Section 134(2) of the Children's Act.

³³ See generally, sections 3.3, 4.3 and 5.3 of Chapter Two.

³⁴ See sections 5.2 of Chapter Three and 5.1 of Chapter Four. On how children's basic and developmental interests limit children's autonomy interests, see sections 5.2-5.3 of Chapter Two.

³⁵ See sections 4.3 of Chapter Three and 4.3 of Chapter Four.

³⁶ See sections 4.2 of Chapter Three and 4.2 of Chapter Four.

Clinic for Abused Children and Another v Minister of Constitutional Development and Another (hereafter *Teddy Bear Clinic*),³⁷ the Constitutional Court accepted expert evidence to the effect that children achieve physiological sexual maturity during adolescence (defined in the judgment as the period between the ages of 12 and 16 years) and engage in different sorts of sexual activities (from kissing to sexual intercourse) at this developmental stage.³⁸ There are numerous publications of evidence-based research confirming children's early sexual development and engagement in penetrative sex.³⁹ In an attempt to protect children from risky sexual practices and

³⁷ 2014 (2) SA 168 (CC).

³⁸ Paras 42-48 and 87-91.

³⁹ For further evidence of early sexual maturation of and intercourse between children, see K Wood, F Maforah and R Jewkes "'He forced me to love him": Putting violence on adolescent sexual health agendas' (1998) 47(2) *Social Science and Medicine* 233, 236, who argue that '[t]eenagers reported that their first sexual encounters occurred at a young age, usually around 13 or 14 years (but as young as 11)'; DJ Ncayiyana and G Ter Haar 'Pregnant adolescents in rural Transkei' (1989) 75(4) *South African Medical Journal* 231-32; E Nash 'Teenage pregnancy – need a child bear a child?' (1990) 77 *South African Medical Journal* 147-51; K Wood, J Maepa and R Jewkes *Adolescent sex and contraceptive experiences: Perspectives of teenagers and clinic nurses in the Northern Province* (Pretoria: MRC Technical Report, 1997); A Harrison, N Xaba and P Kunene 'Understanding safe sex: gender narratives of HIV and pregnancy prevention by rural South African school-going youth' (2001) 9 *Reproductive Health Matters* 63-71; R Jewkes, C Vundule, F Maforah and E Jordaan 'Relationship dynamics and teenage pregnancy in South Africa' (2001) 52 *Social Science and Medicine* 733-44; L Sather and K Zinn 'Effects of abstinence-only education on adolescent attitudes and values concerning premarital sexual intercourse' (2002) 25 *Family Community Health* 1-15; N Starkman and N Rajani 'The case for comprehensive sex education' (2002) 16 *AIDS Patient Care STDS* 313-18; WA Collins 'More than myth: The developmental significance of romantic relationships during adolescence' (2003) 13(1) *Journal of Research on Adolescence* 1-24; AE Pettifor, A Van der Straten, MS Dunbar, SC Shiboski and NS Padian 'Early age of first sex: a risk factor for HIV infection among women in Zimbabwe' (2004) 18 *AIDS* 1435-442; A Harrison, J Cleland, E Gouws and J Frohlich 'Early sexual debut among young men in rural South Africa: Heightened vulnerability to sexual risk?' (2005) 81 *Sex Transmitted Infections* 259-61; CG Hartell 'HIV/AIDS in South Africa: A review of sexual behaviour among adolescents' (2005) 40 *Adolescence* 171-81; AE Pettifor, HV Rees, I Kleinschmidt, C MacPhail, K Vermaak, NS Padian, I Hlongwa-Madikizela and AE Steffenson 'Young people's sexual health in South Africa: HIV prevalence and sexual behaviors from a nationally representative household survey' (2005) 19 *AIDS* 1525-534; PK Kohler, LE Manhart and WE Lafferty 'Abstinence-only and comprehensive sex education and the initiation of sexual activity and teen pregnancy' (2008) 42 *Journal of Adolescent Health* 344-51; A Plüddemann, AJ Flisher, C Mathews, T Carney and C Lombard 'Adolescent methamphetamine use and sexual risk behaviour in secondary school students in Cape Town, South Africa' (2008) 29 *Drug and Alcohol Review* 1-6; C Mathews, LE Aaro, AJ Flisher, W Mukoma, AG Wubs, H Schaalma 'Predictors of early first sexual intercourse among adolescents in Cape Town, South Africa' (2009) 24 *Health Education Research* 1-10; R Jewkes and R Morrell 'Sexuality and the limits of agency among South African teenage women: Theorising femininities and their connections to HIV risk practises' (2012) 74 *Social Science and Medicine* 1729-737; and A Gevers, C Mathews, P Cupp, M Russell and R Jewkes 'Illegal yet developmentally normative: A descriptive analysis of young, urban adolescents' dating and sexual behaviour in Cape Town, South Africa' (2013) 13 *BMC International Health and Human Rights* 31. See also AJ Flisher and A Gevers 'Mental health and risk behaviour' in M Kibel, L Lake, P Pendlebury and C Smith (eds) *South African Child Gauge* (2010) 53, 54, who argue as follows:

According to the National Youth Risk Behaviour Survey, 38% of South Africa's youth have had sex, with 13% reporting being under the age of 14 years at sexual debut. There is considerable evidence that rates of sexual risk behaviour are high. According to the Human Sciences Research Council (HSRC), 8.5% of 15 – 24-year-olds reported having had sex before the age of 15 years; 14.5% had a partner who was more than five years older than themselves; and 30.8% of males aged 15 – 24 years had more than one sexual partner

from parental decisions that are not in the child's best interests, the Children's Act removes decision-making powers from parents and confers on adolescents the autonomy to use contraceptives to protect themselves from STDs and unintended pregnancies.⁴⁰

Knowledge and use of contraception can be matters of life and death. There is authority for the view that unsafe sex and lack of access to contraception are among the top causes of death and permanent injury, especially among women and adolescents.⁴¹ A child who has attained puberty and finds herself involved in unexpected and unprotected sexual intercourse cannot be protected from an unwanted pregnancy by being denied contraceptive drugs. Denying children access to contraceptives drives unsafe sexual practices underground and results in health risks which threaten the child's right to life, survival and development.⁴² Therefore, the state has prescribed that it is in the best interests of the child to allow all adolescents to use contraceptives without parental guidance. This prevents unwanted pregnancies and ensures that girls remain in school for as long as possible.⁴³

in the 12 months prior to the study. Among sexually active grades 8 – 11 learners, 41% reported more than two sexual partners in their lifetime and 52% reported more than one sexual partner in the three months before the survey. In addition, 12% of these learners reported using alcohol or drugs before having sex (footnotes omitted).

⁴⁰ See D McQuoid-Mason 'The effect of the new Children's Act on consent to HIV testing and access to contraceptives by children' (2007) 97(12) *South African Medical Journal* 1252, 1253, where the author argues that The primary reason behind liberalising laws regulating access to contraceptives is the need to prevent unwanted pregnancies and the spread of HIV/AIDS and other venereal diseases.

⁴¹ See generally A Glasier, AM Gulmezoglu, GP Schmid, CG Moreno and PFA Van Look 'Sexual and reproductive health: A matter of life and death' (2006) 368 *Lancet* 1595, 1595, where the authors make the following findings:

Unsafe sex is the second most important risk factor for disability and death in the world's poorest communities and the ninth most important in developed countries. Cheap effective interventions are available to prevent unintended pregnancy, provide safe abortions, help women safely through pregnancy and child birth, and prevent and treat sexually transmitted infections. Yet every year, more than 120 million couples have an unmet need for contraception, 80 million women have unintended pregnancies (45 million of which end in abortion), more than half a million women die from complications associated with pregnancy, childbirth, and the postpartum period, and 340 million people acquire new gonorrhoea, syphilis, chlamydia, or trichomonas infections. Sexual and reproductive ill-health mostly affects women and adolescents. Women are disempowered in much of the developing world and adolescents, arguably, are disempowered everywhere. Sexual and reproductive health services are absent or of poor quality and underused in many countries because discussion of issues such as sexual intercourse and sexuality make people feel uncomfortable.

⁴² See sections 4.3 of Chapter Three and 4.3 of Chapter Four.

⁴³ See Centre for Reproductive Law and Policy (CRLP) and Child and Law Foundation (CLF) *State of denial: Adolescents reproductive health in Zimbabwe* (2002) 17 and VJ Ehlers 'Adolescent mothers' non-utilisation of contraceptives in Zimbabwe' 12 (2) 2010 *Africa Journal of Nursing and Midwifery* 14, 14 and 15.

The Children's Act, in a manner consistent with child liberation ideology and sociological theory,⁴⁴ seeks to protect children by granting them the autonomy to make reproductive decisions without parental control. This stands in sharp contrast to the legislative restrictions imposed on children's autonomy rights in the context of sterilisation. Parliament's approach to sterilisation is quite paternalistic and indicates great hesitance to recognise children's capacities for rational action.⁴⁵ According to the Sterilisation Act,⁴⁶ only persons who are 18 years old and have the capacity to consent may give consent to being sterilised.⁴⁷ Children may only be sterilised if 'failure to do so would jeopardise the person's life or seriously impair his or her physical health'.⁴⁸ More controversially, the Sterilisation Act allows the sterilisation of persons who are incapable of consenting or incompetent to give consent, without their participation in the decision-making process.⁴⁹ Such sterilisation may be performed on a child only-

- upon request to the person in charge of a hospital and with the consent of a parent, spouse, guardian or curator;⁵⁰
- if a panel certifies that (a) failure to sterilise threatens the physical health of the child and (b) there is no other safe and effective method of contraception except sterilisation.⁵¹ The panel should consist of a psychiatrist or medical practitioner, a psychologist or social worker and a nurse.⁵²
- if the child is so disabled to the extent that they are incapable of (a) making their own decision on contraception or sterilisation, (b) developing mentally to a sufficient degree to make an informed judgment on sterilisation or contraception and (c) fulfilling the parental responsibility arising from giving birth.⁵³

Surgical sterilisation often constitutes a severe impairment to the child's physical integrity and permanent infringement of an individual's capacity to reproduce. Thus, the Sterilisation Act

⁴⁴ See sections 4.2 and 6.1-6.3 of Chapter Two.

⁴⁵ For a detailed discussion on the theory of paternalism, see sections 4.1-4.3 of Chapter Two.

⁴⁶ Act 44 of 1998.

⁴⁷ Section 2(1) and (2) of the Sterilisation Act.

⁴⁸ Section 2(3)a) of the Sterilisation Act.

⁴⁹ Section 3(1) of the Sterilisation Act.

⁵⁰ Section 3(1)(a) of the Sterilisation Act.

⁵¹ Section 3(1)(b) of the Sterilisation Act.

⁵² Section 3(2) of the Sterilisation Act.

⁵³ Section 3(1)(c) of the Sterilisation Act.

authorises violations of ‘grown up’ children’s basic right to reproduce, particularly the right to make decisions concerning reproduction. In light of these factors, it is regrettable that the Sterilisation Act permits the sterilisation of children – whether or not they are mentally ill – without the involvement of the courts. At the moment, there is no scope for judicial supervision over the way the relevant panel determines whether (a) the failure to sterilise the child threatens his or her physical health and (b) there is an alternative method of contraception which is safe and effective. Given that the methods used are usually meant to impair, permanently, the child’s capacity to reproduce, the final decision on whether or not the relevant medical procedure should be performed, ought to be made by the court.⁵⁴ This prevents arbitrary sterilisations and creates checks and balances in the way the relevant panel and medical practitioners make decisions on sterilisation.

Since the Sterilisation Act seeks to protect children who are mentally ill from getting pregnant and having to assume parental responsibility, the involvement of the courts would also have protected children (some of whom may be subnormal and stand a chance to develop intellectually) from being unfairly sterilised. Besides, most of the grounds upon which the relevant panel and the doctors may justify sterilisation, are so vague and ambiguous that decision-makers may, without fear of court action, rely on them to justify patently unjust decisions. For example, it is not easy to determine whether (a) the failure to sterilise ‘would jeopardise the person’s life or seriously impair his or her physical health’, (b) a child is incapable of consenting or incompetent to give consent and (c) the child is incapable of (i) making their own decision on contraception or sterilisation, (ii) developing mentally to a sufficient degree to make an informed judgment on sterilisation or contraception and (iii) fulfilling the parental responsibility arising from giving birth. All decisions relating to these matters constitute value judgments made after considering a range of factors and their credibility should be treated with circumspection. Thus, it is necessary to involve not only the courts, but the children concerned.

⁵⁴ On the need to involve the judiciary in sterilisation decisions, see AD Paris ‘Sterilisation of 14 mentally handicapped women challenged’ (2000) 321 *British Medical Journal* 720, 721.

Decisions on whether a child should be subjected to sterilisation are made by parents or guardians and a number of professionals, without the participation of the child to be sterilised. There is no statutory reference to child participation, let alone self-determination, and adults are empowered by statute to make decisions which may have heavy implications for the child's capacity to reproduce. Even if it were to be accepted that sterilisation is meant either to protect mentally ill children from bearing children and assuming parental responsibilities or to save children whose lives would be jeopardised by the state's failure to sterilise them, it is difficult to justify the absolute exclusion of the perspectives of the very children who are to be sterilised. This is particularly so in light of developments in sociological theory, the fiduciary model and the interest theory of rights.⁵⁵

Together with international⁵⁶ and domestic law,⁵⁷ sociological theory and the fiduciary model recognise the social agency and developing competences of the child and the need to give due weight to the views of children as they grow up.⁵⁸ In the context of sterilisation, it is assumed that parents, medical practitioners and psychiatrists act in the best interests of the child. While the legislature took sterilisation as a dangerous and potentially irreversible procedure from which all children should be protected, it is not clear why this view should have totally eclipsed child participation rights as inclusion does not necessarily mean autonomy.⁵⁹ The approach to sterilisation echoes core features of the theory of paternalism, described in Chapter Two,⁶⁰ and casts children as objects of parental and state control, not bearers of relative autonomy rights.⁶¹

The Children's Act departs from the patent paternalism which characterises the provisions of the Sterilisation Act – a piece of legislation that was passed at a time when society was largely sceptical about child participation and autonomy rights. Traditionally, competence determines

⁵⁵ See sections 3.1-3.3, 5.1-5.3 and 6.1-6.3 of Chapter Two.

⁵⁶ See section 5.3.1 and 6.3 of Chapter Three.

⁵⁷ See sections 5.2.1 and 5.2.2 of Chapter Four.

⁵⁸ See sections 3.2-3.3, 5.2-5.3 and 6.2-6.3 of Chapter Two.

⁵⁹ See sections 5.3.1.2 of Chapter Three and 5.2.1 of Chapter Four.

⁶⁰ See section 4.2 and 4.3 of Chapter Two.

⁶¹ As noted in Chapter Two, the fiduciary model, the interest theory of rights and sociological theory recognise children as active social agents with developing competences. See sections 3.1-3.3, 5.1-5.3 and 6.1-6.3 of Chapter Two.

the level of autonomy a child is entitled to exercise.⁶² However, the Children's Act seeks to protect children by giving them autonomy in contraceptive decision-making. This approach departs from the idea that protection rights limit the scope of autonomy rights,⁶³ but it confirms the idea that such intimate and sensitive matters of life as sexuality and reproduction confer individual autonomy on children.⁶⁴ However, oral or injectable contraceptives, unlike condoms, are another form of medical treatment⁶⁵ and the insertion of an intrauterine device is probably equivalent to surgery. Accordingly, there is need for a 'sufficient maturity' test if the concept of informed consent is to remain relevant to medical decision-making, particularly contraception.

2.3 The need for a 'sufficient maturity' test

The Children's Act employs age as the sole criterion for children's autonomy in contraceptive decision-making. Whereas it provides some sense of certainty and ensures that children are not required to demonstrate maturity in order to have access to contraception, an age-based capacity presumption often confers on incompetent children the legal capacity to exercise autonomy in decision-making. This is particularly so if, as in the present case, the age of consent is very low.⁶⁶ Accordingly, the Children's Act undermines the significance of the child's evolving capacities in determining the measure of autonomy to be extended to children.⁶⁷ Even if it were to be accepted (wrongly in my view)⁶⁸ that an average South African child acquires the capacity to understand the nature, risks and benefits of all contraceptive interventions at the age of 12 years, an age-based capacity presumption would not address the needs of children experiencing moderate to severe developmental intellectual delay.⁶⁹ These children are not adequately protected by such a presumption as they are deemed, in a manner consistent with sociological

⁶² See sections 3.3, 4.3 and 5.3 of Chapter Two. See also sections 5.3.1.2 and 6.3 of Chapter Three; and 5.2.1 and 6.1-6.2 of Chapter Four.

⁶³ See sections 5.2 of Chapter Three and 5.1 of Chapter Four.

⁶⁴ See sections 5.3.2 of Chapter Three and 5.3.1 of Chapter Four.

⁶⁵ See Review of the Child Care Act, Discussion Paper 103, (Project 110, 2001) 105, para 6.3.4.

⁶⁶ See section 6.1 of Chapter Five.

⁶⁷ See sections 3.2 of Chapter Two; 5.3.1.2 and 6.3 of Chapter Three; and 5.2.1 and 6.2-6.3 of Chapter Four.

⁶⁸ See section 3.4.1 of Chapter Five. See also A Strode, C Slack and Z Essack 'Child consent in South African law: Implications for researchers, service providers and policy-makers' (2010) 100(4) *South African Medical Journal* 247-49.

⁶⁹ See section 5.3.1.2 of Chapter Three and 5.2.1 of Chapter Four.

theory, to have competences which they do not actually possess.⁷⁰ Like sociological theory,⁷¹ provisions regulating contraception emphasise children's capacities for rational action and to underestimate the role played by adults in mediating the optimal development of the very young.

In addition, the relevant provisions of the Children's Act echo and embody child liberation ideology, particularly the Farson-Holt autonomy thesis, in the context of access to contraception.⁷² Child liberationists would confer autonomy on children of all ages regardless of the individual capacities of each child.⁷³ Chapter Two demonstrated that the theory of paternalism recognises that this is an untenable situation as it exposes incompetent children to the adverse consequences of many ill-considered decisions.⁷⁴ Oral and injectable contraceptives are not any different from other forms of medical treatment and it is not clear why the requirement of 'sufficient maturity' was disregarded in this respect.

Unlike condoms, oral and injectable contraceptives sometimes cause moderate to severe side effects on women who use them. This indicates the importance of informed consent to such forms of contraception. In its response to the proposals made by the SALRC in Discussion Paper 103, Doctors For Life demonstrated that women who use oral and injectable contraception face a 50% greater danger of cervical cancer than those who don't and that women who use these forms of contraception at an earlier age have a greater chance of developing cervical cancer.⁷⁵ Consequently, the SALRC unequivocally accepted 'the fact that oral and injectable contraceptives can have side effects, some of a severe nature'.⁷⁶ Apart from confirming these side effects,⁷⁷ research elsewhere has found that interceptive methods may cause 'pelvic inflammation and permanent infertility'.⁷⁸ The Children's Act disregards the protection rights⁷⁹

⁷⁰ See sections 6.1-6.3 of Chapter Two.

⁷¹ See sections 6.2-6.3 of Chapter Two.

⁷² For a fuller discussion of child liberation ideology, see section 4.2 of Chapter Two.

⁷³ See section 4.2 of Chapter Two. For similar arguments from sociological theory, see sections 6.1-6.3 of Chapter Two.

⁷⁴ Section 4.3 of Chapter Two.

⁷⁵ See SALRC, *Report on the Review of the Child Care Act* (Project 110, 2002) 150, para 10.6.2.

⁷⁶ *Ibid*, 152, para 10.6.3.

⁷⁷ See JO Drife 'The contraceptive pill and breast cancer in young women' (1989) 228 *British Medical Journal* 1269 and A Szarewski J and Guillebaud 'Contraception' (1991) 302 *British Medical Journal* 1224.

⁷⁸ JK Mason ad RA McCall Smith *Law and medical ethics* 5 ed (1999) 108. See also BV Stadel 'Oral contraceptives and cardiovascular disease' (1981) 305 *New England Journal of Medicine* 612 and GR Thornton 'Intrauterine devices: Malpractice and product liability' (1986) 14 *Law, Medicine and Health Care* 4.

and best interests⁸⁰ of many adolescents who lack the capacity to make informed choices in light of these possible negative effects.

The need to ensure confidentiality in the provision of contraceptive treatment does not justify the treatment of incompetent children without the consent of their parents or guardians. In all fairness, it is possible to promote competent children's access to confidential contraceptive treatment without committing deliberate violations of medico-legal ethics relating to the need for another person's consent to treatment if the person being treated is an incompetent child.⁸¹ The fact that a child may be sexually active yet mentally incompetent to understand the nature, risks and benefits of contraceptive treatment is an indication that that child needs both parental consent to such treatment and practical help on how to use contraceptives effectively. Thus, the criteria of age should be combined with the idea of 'sufficient maturity' or the capacity for informed consent to contraception. Finally, where contraception has not been used or has for some reason been ineffective, the child may become pregnant and, depending on the child's choice, the need to terminate her pregnancy may arise.

3 THE TERMINATION OF PREGNANCY

3.1 The historical evolution of abortion laws in South Africa

Historically, South African common law permitted abortion only on the ground of necessity - the clearest example thereof being the need to save the pregnant woman's life.⁸² If carried out for other reasons, abortion would constitute a crime under the common law.⁸³ In an attempt to facilitate access to legal abortion, the apartheid government passed the Abortion and Sterilisation Act (hereafter the Abortion Act).⁸⁴ The Abortion Act (now repealed) permitted an abortion if the pregnancy threatened the woman's life or physical or mental health, led to severe malformation

⁷⁹ See sections 5.2 of Chapter Three and 5.1 of Chapter Four.

⁸⁰ See sections 4.3 of Chapter Three and 4.3 of Chapter Four.

⁸¹ See section 3 of Chapter Five.

⁸² See JRL Milton *South African criminal law and procedure Vol II Common law crimes* 3 ed (1996) 305.

⁸³ See B Van Heerden, A Cockrell and R Keightley (eds) *Borberg's law of persons and the family* 2 ed (1999) 28, 44 fn 28.

⁸⁴ Act 2 of 1975.

of the baby, or was a product of rape, incest or other forms of unlawful sexual intercourse with a woman.⁸⁵ To qualify for an abortion, women had to obtain approval from two independent medical practitioners, none of whom had the authority to perform the abortion.⁸⁶ The limited grounds upon which abortion could be legally requested and the procedural formalities to be completed before an abortion could be carried out, limited women's access to abortion services under the Abortion Act.

Today, the termination of pregnancy is extensively regulated by the Choice Act which expressly states that it 'repeals the restrictive and inaccessible provisions of the Abortion and Sterilisation Act, promotes reproductive rights and extends freedom of choice by affording every woman the right to choose whether to have an early, safe and legal termination of pregnancy according to her individual beliefs'.⁸⁷ In addition, the Choice Act reiterates that the Constitution recognises 'the right of persons to make decisions concerning reproduction and to security in and control of their bodies'.⁸⁸ It further recognises that every person has 'the right to be informed of and to have access to safe [and] effective methods of fertility regulation of their choice' and that every woman has 'the right of access to appropriate health care services to ensure safe pregnancy and childbirth'.⁸⁹

These provisions make it clear that the purpose of the Choice Act is to give effect to the child's reproductive autonomy rights, discussed above.⁹⁰ Another related feature of the legislation is that it creates an environment in which pregnant women may make free reproductive choices.⁹¹ Third, the focus on 'early, safe, legal and effective termination of pregnancy' suggests that the Choice Act was enacted to respond to the epidemic of unsafe and illegal abortions that were reported when the stringent provisions of the Abortion and Sterilisation Act were operative.⁹²

⁸⁵ Section 3 of the Abortion and Sterilisation Act.

⁸⁶ See section 3(1)(a)-(e) of the Choice Act.

⁸⁷ Preamble of the Choice Act.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ See section 5.3 of Chapter Four.

⁹¹ See section 5.3.1 of Chapter Four. See also section 5.3.3 of Chapter Three.

⁹² See generally S Guttmacher, F Kapadia, JTW Naude and H De Pinho 'Abortion reform in South Africa: A case study of the 1996 Choice on Termination of Pregnancy Act' (1998) 24(4) *International Family Planning Perspectives* 191, 192.

This point is discussed in detail below.⁹³ Finally, the main duty of the state under the new legal framework is to promote reproductive choice and not to restrict access to termination of pregnancy services.⁹⁴ Below is an analysis of how specific provisions governing women's consent to the termination of pregnancy seek to achieve these broad goals.

3.2 Grounds for the termination of pregnancy

In terms of the Choice Act, pregnant women may have an abortion on request in the first trimester of pregnancy.⁹⁵ Section 2(1)(a) thereof provides that 'a pregnancy may be terminated *upon request of a woman* during the first 12 weeks of the gestation period of her pregnancy'. This provision marks a departure from the common law and the Abortion Act in that it introduces the termination of pregnancy on demand. During the first trimester, a pregnancy may be terminated on the request of a pregnant woman and no other conditions are attached to the woman's request to her termination of pregnancy. Read with sections 1(xi) and 5(1)-(3) of the Choice Act,⁹⁶ discussed below, section 2(1)(a) permits pregnant minors to authorise the termination of their pregnancies without having to prove the existence of any grounds. It also signifies a move away from parental rights to the pregnant minor's right to make reproductive decisions according to her 'own beliefs'. The relevant provisions have great resonance with

⁹³ See section 3.4 of this chapter.

⁹⁴ See section 27(2) of the Constitution.

⁹⁵ Sections 2(1)(a) and 5 of the Choice Act read together. Section 2(1) of the Choice Act provides as follows:

A pregnancy may be terminated -

- (a) upon request of a woman during the first 12 weeks of the gestation period of her pregnancy;
- (b) from the 13th up to and including the 20th week of the gestation period if a medical practitioner, after consultation with the pregnant woman, is of the opinion that-
 - (i) the continued pregnancy would pose a risk of injury to the woman's physical or mental health; or
 - (ii) there exists a substantial risk that the foetus would suffer from a severe physical or mental abnormality; or
 - (iii) the pregnancy resulted from rape or incest; or
 - (iv) the continued pregnancy would significantly affect the social or economic circumstances of the woman; or
- (c) after the 20th week of the gestation period if a medical practitioner, after consultation with another medical practitioner or a registered midwife, is of the opinion that the continued pregnancy-
 - (i) would endanger the woman's life;
 - (ii) would result in a severe malformation of the foetus; or
 - (iii) would pose a risk of injury to the foetus.

⁹⁶ Section 1(xi) defines a 'woman' as 'any female person of any age' and section 5 provides that a pregnancy may be terminated only with the informed consent of the woman.

sociological theory and the fiduciary model, emphasising the separate personhood of the child and child-as-active-agent mantra.⁹⁷

From the 13th to the 20th week, an abortion may be procured if, among other grounds, ‘the continued pregnancy would significantly affect the social or economic circumstances of the woman’.⁹⁸ The other grounds mentioned in section 2(1)(b) approximate those stated in the Abortion Act, but the additional ground of ‘socio-economic circumstances’ permits minors to seek an abortion on the basis that they will not be able to support the child if required to carry the pregnancy to term. If after consulting with the pregnant woman, a medical practitioner is of the opinion that any of the stated grounds exists, such pregnancy may be terminated. After the 20th week, abortion may only be performed on the grounds that the pregnancy poses a risk to the health of the mother or the foetus.⁹⁹ At this stage, the medical practitioner must, after consulting with another medical practitioner or registered midwife, be of the opinion that any of these grounds exists. The informed consent of the pregnant woman is required before a pregnancy is terminated at each stage of the gestation period.¹⁰⁰

3.3 Informed consent to termination of pregnancy

The Choice Act does not specify any age of consent and every pregnant minor qualifies as a woman for purposes of termination of pregnancies. Section 5(1) of the Choice Act provides that ‘the termination of a pregnancy may only take place with the *informed consent* of the pregnant woman’. Read together, these provisions imply that every woman, regardless of their age, has the right to consent to the termination of her own pregnancy.¹⁰¹ To exercise the right to authorise an

⁹⁷ See sections 3.1-3.3 and 6.1-6.3 of Chapter Two.

⁹⁸ Section 2(1)(b) of the Choice Act.

⁹⁹ Section 2(1)(c) of the Choice Act.

¹⁰⁰ See section 5(1) and (2) of the Children’s Act.

¹⁰¹ A literal reading of the Choice Act results in an anomaly in terms of which all pregnant minors of all ages who are neither severely mentally retarded nor in a state of perpetual unconsciousness are considered to be intellectually competent to give informed consent to a termination of pregnancy. In this respect, Himonga and Cooke have criticised the drafters of the Choice Act for wrongly assuming that the moment a child becomes pregnant, she thereby acquires the required capacity to understand the risks and benefits of an abortion. See C Himonga and A Cooke ‘A child’s autonomy with special reference to reproductive medical decision-making in South African law: Mere illusion or real autonomy’ (2007) 15 *International Journal of Children’s Rights* 333. For comparative arguments about the termination of pregnancy regime in Britain, see J Herring ‘Children’s abortion rights’ (1998) 5 *Medical Law Review* 257.

abortion, women should have the capacity to give informed consent to the relevant medical procedure.

The Choice Act does not define the notion of ‘informed consent’, but the National Health Act (NHA) defines it as ‘consent for the provision of a specified health service given by a person with legal capacity to do so and who has been [adequately] informed’ about the nature, risks and benefits of the medical procedure.¹⁰² The Transvaal High Court has already given the meaning of ‘informed consent’ in the context of termination of pregnancies. In *Christian Lawyers Association of South Africa v Minister of Health* (hereafter *Christian Lawyers Association II*),¹⁰³ Mojapelo J held that ‘the cornerstone of the regulation of the TOP of a girl under the Act is the requirement of her informed consent. No female person, regardless of her age, may have her pregnancy terminated unless she is capable of giving her informed consent to the termination and in fact does so’.¹⁰⁴ He explained that informed consent included three components: knowledge, appreciation and consent.¹⁰⁵ Knowledge means that the woman who consents to the termination of pregnancy should have ‘full knowledge of the nature and extent of the harm or risks’ associated with the relevant procedure.¹⁰⁶

The element of ‘appreciation’ implied something more than knowledge and meant that the pregnant woman ‘must also comprehend and understand the nature and extent of the harm or risk’.¹⁰⁷ ‘Consent’ means that a pregnant woman must, as a matter of fact, ‘subjectively consent to the harm or risk associated with the termination of her pregnancy’.¹⁰⁸ Her ‘consent must be comprehensive’ in the sense that it must ‘extend to the entire transaction, inclusive of its consequences’.¹⁰⁹ Mojapelo J insisted that ‘valid consent can only be given by someone with the intellectual and emotional capacity for the required knowledge, appreciation and consent’.¹¹⁰ The

¹⁰² Sections 6(1)(a)-(d) and 7(3) of the NHA read together.

¹⁰³ 2005 (1) SA 509 (T).

¹⁰⁴ Para 19.

¹⁰⁵ Para 20. Mojapelo was following the holding made by Innes CJ in *Waring & Gillow Ltd v Sherborne* 1904 Th 340 at 344.

¹⁰⁶ Para 21. The Court was following *Castell v De Greef* at 425.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid, paras 21-22.

Choice Act authorises every pregnant woman who has the capacity for informed consent to have an abortion regardless of her age or youthfulness.¹¹¹

To begin with, the focus on ‘informed consent’ emphasises the role of the child’s evolving capacities in conferring reproductive autonomy on children of all ages.¹¹² This is consistent with several theoretical models which recognise that children gradually attain rights to and capacities for self-determination.¹¹³ Parents or guardians, as fiduciaries or paternalists, have the duty to relinquish, gradually, their control of the child in order to enable the child to develop capacities for rational autonomy.¹¹⁴ The developing competences of the child require that parents nurture children to take responsibility for personal actions and to make autonomous decisions whenever the child acquires the capacity to make decisions in their own best interests.¹¹⁵ Similarly, most of the autonomy rights entrenched in the Bill of Rights are to be exercised by children who have the capacity for rational action.¹¹⁶ These principles are incorporated into the Choice Act as it recognises the emancipatory function of the child’s developing competences.¹¹⁷

However, the concept of ‘informed consent’ also allows parents to make reproductive decisions for minors who have no mental capacity to understand the proposed procedure for an abortion.¹¹⁸ This is another way of recognising that autonomy rights are the preserve of those with the capacity for rational action.¹¹⁹ International and domestic law demonstrate that incompetent minors should not be abandoned to their autonomy rights as this threatens their best interests and basic right to life, survival and development.¹²⁰ If the child is incapable of understanding the instructions given by the medical practitioner or weighing up the risks and benefits of the

¹¹¹ In *Christian Lawyers Association II*, para 54, Mojaelo J would later hold that ‘the Act allows all women who have the intellectual and emotional capacity for informed consent to choose whether to terminate their pregnancies or not. It does not distinguish between them on the ground of age’.

¹¹² On the scope of the evolving capacities of the child, see sections 5.3.1.2 and 6.3 of Chapter Three, and section 5.2.1 of Chapter Four.

¹¹³ See sections 3.1-3.3, 4.1-4.3, 5.1-5.3 and 6.1-6.3 of Chapter Two.

¹¹⁴ See sections 3.2-3.3 and 4.2-4.3 of Chapter Two.

¹¹⁵ See sections 3.3, 4.3 and 5.3 of Chapter Two. See also sections 5.3.1.2, 6.2 and 6.3 of Chapter Three and 5.2.1 of Chapter Four.

¹¹⁶ See section 5.3.5 of Chapter Four.

¹¹⁷ See sections 5.3.2.1 and 6.3 of Chapter Three.

¹¹⁸ See *Christian Lawyers Association II*, para 22.

¹¹⁹ See sections 3, 4 and 5 of Chapter Two.

¹²⁰ Sections 4.2 of Chapter Three and 4.2 of Chapter Four.

available options, then the consent of another person with authority over the child is required.¹²¹ As demonstrated in Chapter Five, the touching of a patient who lacks the capacity to consent to treatment without the authorisation of the person who has authority over that patient violates the physical integrity of the patient.¹²² Accordingly, the minor's lack of 'capacity for knowledge, appreciation and consent' limits her right to self-determination in the context of termination of pregnancies.

However, the lack of capacity for informed consent does not necessarily mean that the pregnant minor is not entitled to an abortion which is in her own best interests. It just means that the minor may not legally independently validly consent to an abortion. In my view, it is difficult for a parent to show that early pregnancies are in the best interests of children and to deny the termination thereof, especially if the child (though incompetent) is willing to have the pregnancy terminated. In any event, since it is the medical practitioner who determines, most likely in the absence of parents, whether the child possesses the capacity for informed consent to the termination of pregnancy, the medical practitioner may well deem the pregnant minor 'competent' and avoid having to seek parental consent to the termination thereof. This is particularly so in light of the Choice Act's focus on informed choice on termination of pregnancy.

3.4 Informed choice on termination of pregnancy and the rationale for minors' reproductive autonomy

Once the child acquires the capacity for informed consent, she becomes entitled to terminate her pregnancy without the consent of anyone else. Section 5(2) of the Choice Act provides that '[n]otwithstanding any other law...no consent other than that of the pregnant woman shall be required for the termination of a pregnancy'. It must be stated, at the outset, that provisions regulating consent to abortion recognise, in line with sociological theory, children's active participation as social actors in decisions that affect them.¹²³ Depending on the proposed procedure, the termination of pregnancy constitutes either medical treatment or a surgical

¹²¹ See, for example, *Ex parte Dixie* 1950 (4) SA 748 (W) at 751.

¹²² See section 3.1-3.3 of Chapter Five.

¹²³ See section 6.1-6.3 of Chapter Five.

operation. Chapter Five demonstrated that the Children's Act confers on a parent or guardian the duty to consent to the medical treatment of or surgical operation on a child who is under the age of 12 years.¹²⁴ Similarly, a child below the age of 18 years needs parental assistance in order to consent to a surgical operation.¹²⁵

The phrase 'notwithstanding any other law' is intended to govern the relationship between 'any other law', say the Children's Act, and the Choice Act. Thus, a pregnant minor who is below or above 12 years is competent to consent to medical treatment and surgical operations associated with the termination of pregnancy without the assistance of a parent or guardian. The provisions of the Children's Act are 'subject' to those of the Choice Act. Therefore, they do not apply to the termination of pregnancies by minors with the capacity to give informed consent.¹²⁶ This is because the Choice Act confers on a female person of any age the right to terminate a pregnancy without parental consent.

The Choice Act confers on all pregnant minors the autonomy to make decisions regarding the termination of pregnancy provided they are capable of giving informed consent to the relevant procedure. This interpretation is supported by the fact that (i) a pregnancy may be terminated upon the request of a pregnant woman;¹²⁷ (ii) a termination of pregnancy may take place *only* with the *informed consent* of the pregnant woman;¹²⁸ and (iii) 'no consent other than that of the pregnant woman shall be required for' a termination of pregnancy.¹²⁹ Even where the termination of pregnancy constitutes a very invasive surgical operation, very young and mentally competent pregnant minors may give informed consent to the relevant procedures without the parental assistance required for surgical operations in terms of the Children's Act.¹³⁰

To begin with, the Choice Act disaggregates children's reproductive rights from the rights of parents and portrays children as ends in the context of termination of pregnancies.¹³¹ This

¹²⁴ See section 3.3 of Chapter Five.

¹²⁵ Section 129(5)(c) of the Children's Act.

¹²⁶ See section 3.1 of Chapter Five.

¹²⁷ Section 2(1) of the Choice Act.

¹²⁸ Section 5(1) of the Choice Act.

¹²⁹ Section 5(2) of the Choice Act.

¹³⁰ Compare with section 3.1 of Chapter Five.

¹³¹ See sections 2.3 of Chapter Two and 5.3.2 of Chapter Four.

represents a departure from the historical focus on the parental right to control or guide children in making decisions.¹³² Even doctors and the state may not deny a competent pregnant minor the right to terminate her pregnancy (on demand) during the first trimester. In this way, the Choice Act departs from the notion that children need parental guidance and protection in making important decisions.¹³³ However, the most alarming presumption seems to be that competent children are better protected from harm by conferring on them the autonomy to make independent decisions.

Pregnancy raises unique issues. To a larger extent, reproductive autonomy rights enable children to make decisions on intimate matters of life and to overcome the practical challenges associated with the notion of parental consent. Chapters Three and Four have shown that children enjoy relative autonomy in those areas of the law which relate to intimate and sensitive matters over which parents are likely to hold different views.¹³⁴ This is particularly so if such autonomy is exercised by a mature minor in a manner that enhances the protection of the very minor's best interests and right to life, survival and development. Due to the confidential nature of sexuality and reproduction, minors tend to resort to unsafe abortion if required to seek the consent of parents and unsafe abortion is more harmful to the child's best interests than access to safe abortion without parental consent.¹³⁵ Many children would not even wish their parents to know that they engage in consensual sex while in school and would rather resort to unsafe abortion if legally required to seek parental consent to termination of pregnancies.¹³⁶ According to the Committee on the Rights of the Child, the 'limited availability of contraceptives, poor reproductive health education and the requirements of *parental consent* have resulted in an increasing number of illegal abortions among girls'.¹³⁷ These factors contribute to the disproportionately high mortality of African women from unsafe abortion.¹³⁸

¹³² See sections 3 and 4 of Chapter Two. See also sections 6.1 of Chapter Three and 6.1-6.2 of Chapter Four.

¹³³ See sections 3.3, 4.3 and 5.3 of Chapter Two.

¹³⁴ See sections 5.3.2 of Chapter Three and 5.3.1 of Chapter Four.

¹³⁵ For practical reasons why minors often elect not to tell parents about pregnancy, see Women's Legal Centre *Annual Report* (2004) 7 and J Weeks *Population: An introduction to issues and concepts* 7 ed (1999) 178-82.

¹³⁶ See G Van Bueren *The international law on the rights of the child* (1995) 312, who argues that '[i]n practical terms an insistence on notification could have the result of inhibiting children from seeking medical advice where sensitive issues are involved...If a child consents to parental notification, however, there is not any problem'.

¹³⁷ United Nations Committee on the Rights of the Child, *Concluding Observations: Kyrgyzstan*, 24th Sess., para 45, UN Doc. CRC/C/15/Add.127 (2000) and CRC Committee, General Comment No. 4 (2003): Adolescent Health and

In South Africa, anecdotal evidence suggests that back street abortions dramatically increased to between 120 000 and 250 000 annually between 1975 and 1996.¹³⁹ This increase has been attributed to the enactment of the restrictive provisions of the Abortion Act. In addition, childbirth complications and unsafe abortions have been reported as some of the major causes of maternal mortalities in the 15-19 year age group and pregnant minors younger than 15 years are generally at five times higher risk than pregnant women aged 20 years and above.¹⁴⁰ These realities explain why the autonomy threshold envisaged in the Choice Act is more far-reaching than that contemplated in international law or the Children's Act.

There is wide scope for arguing that where a pregnant minor consents to have their pregnancy terminated, such a decision promotes their best interests and right to life regardless of whether or not they have the capacity for informed consent. Similarly, it is difficult to demonstrate why pregnant minors, whether competent or not, should be forced to carry their pregnancies to term because early pregnancies are generally not in their best interests.¹⁴¹ This is because early pregnancy threatens the child's right to life, survival and development.¹⁴² Carrying a pregnancy to term requires sacrifices only the pregnant woman can make and forcing her to do so

Development in the Context of the Convention on the Rights of the Child, 33rd Sess, UN Doc. CRC/GC/2003/4 (2003) para 31.

¹³⁸ See Communiqué from the Action to Reduce Maternal Mortality in Africa Regional Consultation on Unsafe Abortion, March 5-7 (2003) Addis Ababa, Ethiopia; WHO, *The prevention and management of unsafe abortion: Report of a technical working group* (Geneva: WHO, 1992); WHO, *Unsafe abortion: Global and regional estimates of incidence of and mortality due to unsafe abortion with a listing of available country data* (Geneva: WHO, 1998) 8, where it is stated that Africa has the highest regional incidence of recourse to unsafe abortion by adolescents; C Ngwenya 'Inscribing abortion as a human right: Significance of the Protocol on the Rights of Women in Africa' (2010) 32(4) *Human Rights Quarterly* 783, 815; I Shah and E Åhman 'Age patterns of unsafe abortion in developing country regions' (2004) 12(24) *Reproductive Health Matters* 9; and World Health Organisation (WHO) *Reproductive health strategy to accelerate progress towards the attainment of international development goals and targets* (2004) 7.

¹³⁹ H Rees et al 'The epidemiology of incomplete abortions in South Africa' (1997) 87(4) *South African Medical Journal* 432-37.

¹⁴⁰ See United Nations Population Fund, *Maternal mortality update 2004 – Delivering into good hands* (New York: United Nations Population Fund and University of Aberdeen, 2004).

¹⁴¹ More importantly, children born of poor and young parents (who are children themselves) start off badly in life and have limited chances to enjoy fully the rights to life, health care services, education housing, food and clean water. Some have even claimed that in poor resource contexts, some 'children' have the right not to be born. See for example M Freeman 'Do children have the right not to be born?' in M Freeman (ed) *The moral status of children: Essays on the rights of the child* (1997) 165.

¹⁴² See section 4.3 of Chapter Three, where the term 'development' is defined to include the development of the intellect, through access to education and other services.

undermines her freedom to determine how to use her own body.¹⁴³ For these reasons, abortion should be seen as an exception to the general rules governing consent to medical treatment because competent children are better protected by being afforded autonomy in this intimate sphere of life.¹⁴⁴

3.5 Parental responsibility in the context of termination of pregnancy

Section 5(3) of the Choice Act is designed to ensure that young children, who wish to consult with their parents, benefit from parental guidance in making decisions on termination of pregnancies. It provides as follows:

In the case of a pregnant minor, a medical practitioner or a registered midwife, as the case may be, shall advise such minor to consult with her parents, guardian, family members or friends before the pregnancy is terminated: Provided that the termination of the pregnancy shall not be denied because such minor chooses not to consult them.

If the child agrees to the involvement of parents, the latter's views will no doubt enrich the decision-making process. Parents know the circumstances surrounding the child, their immediate needs, their socio-economic position and the various ways in which the termination or non-termination of pregnancy will negatively affect the pregnant child in light of the latter's background, age, religion and level of education. The doctor's duty to advise the child to consult with her parents implies that the doctor should not proceed without the participation of parents unless he or she is satisfied that:

- the child will appreciate the advice given by the medical practitioner;
- it is not possible for him or her to persuade the child to inform her parents or to allow the practitioner to do so;
- the child is very likely to begin or to proceed to have illegal and unsafe abortion;
- unless the child receives treatment, her health and life are likely to be endangered; and

¹⁴³ See sections 5.3.2 of Chapter Three and 5.3.4 of Chapter Four.

¹⁴⁴ See sections 5.3.2 of Chapter Three and 5.3.1 of Chapter Four.

- the child's best interests require the medical practitioner to act without parental involvement.¹⁴⁵

These conditions ensure that the doctor does not take lightly the duty to advise the child to consult with parents about the termination of pregnancy. The doctor's duty to encourage the child to involve parents is not intended to protect any separate parental interests, but to enhance the child's protection before and after the proposed abortion. This claim is supported by the fact that the termination of pregnancy 'shall not be denied because such minor chooses not to consult' with parents and that even if the pregnant minor chooses to consult with her parents, the doctor still needs *only* the consent of the minor in order to proceed with the termination of pregnancy.¹⁴⁶

In *Christian Lawyers Association II*, the Christian Lawyers Association challenged the constitutionality of section 5(1), (2) and (3) of the Choice Act, partly because its provisions permit a child to terminate her pregnancy without parental consent. The Court held that 'the cornerstone of the regulation of the termination of pregnancy' is the pregnant minor's informed consent.¹⁴⁷ It further held that where a pregnant child who is expected to give consent to an abortion is young and immature, 'the normal common-law rules that require the consent to be given by or with the assistance of the guardian must necessarily kick in'.¹⁴⁸ Mojapelo J clarified these remarks by holding that '[y]oung and immature children do not have the capacity for real knowledge, appreciation and consent. Such young and immature children therefore would not qualify under the Act to access the rights to termination of pregnancy because they are incapable of complying with the important jurisdictional requirement of giving informed consent'.¹⁴⁹ Parental responsibility remains relevant to an incompetent child's right to terminate a pregnancy.

However, it is still not in the best interests of a minor for her to be required to carry her pregnancy to term simply because the parent is refusing to permit the termination thereof. To

¹⁴⁵ For a comparative approach, see Lord Fraser in *Gillick v West Norfolk and Wisbech Area Health Authority and Another* [1986] 1 AC 112 at 174.

¹⁴⁶ Subsections 5(1), (2) and (3) of the Choice Act read together.

¹⁴⁷ Para 19.

¹⁴⁸ *Ibid*, para 22.

¹⁴⁹ *Ibid*.

allow parents to refuse, for trivial reasons, an abortion on behalf of incompetent children would be to return to the property theory of rights¹⁵⁰ and to frustrate the child's right to reproductive health.¹⁵¹ In *G v Superintendent, Groote Schuur Hospital and Others* (hereafter *G v Groote Schuur Hospital*),¹⁵² the pregnant minor's guardian had refused to grant the required consent to the termination of an unintended pregnancy allegedly conceived as a result of rape and the Court permitted the abortion to proceed on the basis of ministerial consent.¹⁵³ Similarly, the Choice Act leaves room for pursuing this approach to prevent the frustration of children's constitutional right reproductive health.¹⁵⁴ Overall, parental responsibility in respect of the termination of minors' pregnancies has been severely curtailed, even where the child lacks the capacity for informed consent, because early pregnancies are inconsistent with the child's best interests and right to life, survival and development.

4 THE STATE'S ROLE IN LIMITING A MINOR'S RIGHT TO TERMINATE HER PREGNANCY

The Choice Act does not leave children's exercise of reproductive autonomy entirely unregulated. If the child makes a choice to terminate her pregnancy in the third trimester, such request cannot be implemented unless it is clear that continued pregnancy threatens the minor's life or will lead to 'severe malformation of the foetus' or will 'pose a risk of injury to the foetus'.¹⁵⁵ Thus, the limitation of the woman's right to terminate a pregnancy comes from two strands. These are the pregnant woman's right to life and the state's interest in preserving prenatal life. These limitations are explored in turn.

¹⁵⁰ See section 2.1-2.3 of Chapter Two.

¹⁵¹ See section 5.3 of Chapter Four for a fuller discussion of autonomy- and health-related rights.

¹⁵² 1993 (2) SA 255 (C).

¹⁵³ At 262G-H.

¹⁵⁴ See *Christian Lawyers Association II*, para 25. For comparative jurisprudence, see generally JL Rue 'The distribution of contraceptives to unemancipated minors: Does a parent have a constitutional right to be notified' (1980-81) 69(2) *Kentucky Law Journal* 436 and SA Bush 'Parental notification: A state-created obstacle to a minor woman's right to privacy' (1982) 12(3) *Golden Gate University Law Review* 579.

¹⁵⁵ Section 2(1)(c) of the Choice Act.

4.1 The pregnant minor's right to life

A pregnant minor's right to terminate her pregnancy is limited by her own right to life. In the early stages of pregnancy, the state's interest in preserving the pregnant minor's life is less compelling as the termination of pregnancy is less dangerous than it is in the second and third trimesters.¹⁵⁶ Accordingly, the escalating risk, to the mother, associated with abortion in the third trimester stands as sufficient justification for limiting the reproductive autonomy rights. Chapters Three and Four have demonstrated that the right to life imposes on the state the positive duty to prevent the killing of its citizens.¹⁵⁷ If a pregnant minor were to seek an abortion for trivial reasons in the last trimester of her pregnancy, the state would protect the very minor from the dangers attached to her proposed course of action. Children's protection rights draw the boundaries within which children should exercise autonomy and justify state intervention when manifestations of autonomy undermine the child's best interests and threaten the basic right to life.¹⁵⁸ As shown above, the best interests of the child require the state to limit minors' autonomy rights if these rights are exercised in a manner which threatens the minor's basic right to life, survival and development.¹⁵⁹

While some scholars have argued that restricting women's reproductive autonomy rights risks turning them into 'foetal incubators',¹⁶⁰ this argument does not justify the potential invasion of the right to life for purposes of expanding children's reproductive autonomy. By nearly denying women the freedom to abort in the third trimester, the Choice Act affirms the state's duty to protect pregnant minor's lives¹⁶¹ and promote their best interests. Third trimester abortions may be procured on 'if a medical practitioner, after consultation with another medical practitioner or a registered midwife, is of the opinion that continued pregnancy would endanger the woman's life'. The responsibility for determining whether the conditions for an abortion exist lies with the medical practitioner, not the pregnant minor. On the whole, the conditions attached to third trimester abortions limit the child's timing of the minor's choice on termination of pregnancy

¹⁵⁶ *Christian Lawyers Association II*, para 39.

¹⁵⁷ See sections 4.3 of Chapter Three and 4.3 of Chapter Four.

¹⁵⁸ See sections 5.2 of Chapter Three and 5.1 of Chapter Four.

¹⁵⁹ See sections 4.2 of Chapter Three and 4.2 of Chapter Four.

¹⁶⁰ C Neff 'Woman, womb and bodily integrity' (1991) 3 *Yale Journal of Law and Feminism* 327, 350.

¹⁶¹ See sections 4.3 of Chapter Three and 4.3 of Chapter Four.

and expand the province of state intervention in the decision-making process. This approach recognises the role played by protection rights in limiting children's autonomy rights.¹⁶²

4.2 The state's interest in preserving prenatal life

At common law, legal subjectivity begins at birth and an unborn foetus does not have the rights of a born child.¹⁶³ Whereas the *nasciturus* fiction provides limited protection to the rights of the unborn, it does not create for the foetus the right to life.¹⁶⁴ However, the fact that a foetus is not entitled to the constitutional right to life does not say anything about whether the state has an interest in protecting developing human life. Thus, it is possible to concede that the state has an interest in regulating the termination of pregnancies without denying pregnant women the constitutional right to terminate their pregnancies.¹⁶⁵ In *G v Groote Schuur Hospital*, the Cape Provincial Division expressed the view 'that an unborn child has an interest capable of protection, in circumstances where its very existence is threatened'.¹⁶⁶ In *Christian Lawyers Association II*, the Court held that 'the state has an important and legitimate interest in the preservation and protection...of the potential life of the foetus. When its interest in doing so becomes sufficiently compelling, it warrants State intrusion upon the woman's privacy and self-determination'.¹⁶⁷

¹⁶² See sections 3.3, 4.3 and 5.3 of Chapter Two. See also sections 5.2 of Chapter Three and 5.1 of Chapter Four.

¹⁶³ However, if it is to its advantage, a foetus is, in terms of the *nasciturus* fiction, deemed to have been born at the time of conception and to have all the rights provided it is subsequently born alive. See C Himonga 'Unborn persons' in F Du Bois (ed) *Wille's principles of South African law* (2007) 161, 161.

¹⁶⁴ In *Christian Lawyers Association of South Africa and Others v Minister of Health and Others* (hereafter *Christian Lawyers Association I*) 1998 (4) SA 1113 (T), the Court held, at 1122I-1123B/C, that the foetus does not enjoy the right to life which is afforded to 'everyone' under section 11 of the Constitution, and that the Constitution does not limit pregnant women's rights to make decisions concerning reproduction and to security in and control over their bodies in order to protect the foetus from abortion.

¹⁶⁵ See S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional law of South Africa* 2 ed (2005) 36-1, 36-4; M O'Sullivan 'Reproductive rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional law of South Africa* 2 ed (2005) 37-1, 37-2; I Currie and J De Waal 'Life' in I Currie and J De Waal *The Bill of Rights handbook* 6 ed (2013) 258, 266; J Sarkin-Hughes 'Choice and informed request: The answer to abortion' (1990) 1 *Stellenbosch Law Review* 372 and J Sarkin-Hughes 'Abortion and the courts' in S Liebenberg (ed) *The Constitution of South Africa from a gender perspective* (1995) 217, 227 and 229.

¹⁶⁶ At 259D-E. See also LM Du Plessis 'Jurisprudential reflections on the status of the unborn life' in (1990) 1 *Tydskrif vir die Suid-Afrikaanse Reg* 44, 51-54, where the author argues that the law must provide what he calls 'preventive protection' for the unborn child.

¹⁶⁷ *Christian Lawyers Association II*, paras 38-39.

Generally, the state's interest in regulating abortion becomes progressively stronger from the 20th week of the gestation period onwards as foetal viability is roughly estimated to begin at that stage.¹⁶⁸ For this reason, the Choice Act begins to attach serious conditions to the woman's right to terminate her pregnancy in the third trimester. Third trimester abortions are only available when the pregnancy poses a danger to the life of the foetus or the pregnant minor.¹⁶⁹ Foetal life in the period just before birth is not very different from the life of a new born babe and this concretises the state's interest in protecting prenatal life. At this stage, the foetus would have grown substantially and the state's interest in regulating a competent minor's right to consent to an abortion becomes even more compelling.¹⁷⁰

5 CHALLENGES AND POSSIBLE AREAS OF REFORM

5.1 The need to combine 'informed consent' with a specific age of consent

The total disregard of age as a criterion for measuring children's capacity to give informed consent to an abortion is liable to abuse in two ways. First, a competent child on the verge of attaining majority has no redress if the treating physician were to decide, wrongly for that matter, that she lacks the capacity for informed consent.¹⁷¹ Second, the open-ended approach to capacity

¹⁶⁸ J Sarkin-Hughes 'A perspective on abortion legislation in South Africa's Bill of Rights era' (1993) 51(1) *Tydskrif vir Hedendaagse Romeins Hollandse Reg* 83, 89 and C Pickles 'Termination-of-pregnancy rights and foetal interests in continued existence in South Africa: The Termination of Pregnancy Act 92 of 1996' (2012) 15(5) *Potchefstroom Electronic Law Journal* 403, 420.

¹⁶⁹ In terms of section 2(1)(c) of the Choice Act, 'a pregnancy may be terminated... after the 20th week of the gestation period if a medical practitioner, after consultation with another medical practitioner or a registered midwife, is of the opinion that the continued pregnancy-

- (i) would endanger the woman's life;
- (ii) would result in a severe malformation of the foetus; or
- (iii) would pose a risk of injury to the foetus.

¹⁷⁰ See *Christian Lawyers Association II*, para 39, where the Court held that '[o]nly when the foetus becomes viable, which occurs more or less at the end of the second trimester, does the State's interest in the protection of the health and welfare of the foetus become sufficiently compelling to warrant intrusion for that purpose. The State may then regulate and even prohibit abortion to protect the life of the foetus provided that it does not preclude abortion when necessary to preserve the life and health of the woman herself'. At para 52 of the same case, the Court regarded the state's duty to protect 'pre-natal life as an important value in our society to regulate and limit the woman's right to choose' to terminate a pregnancy. See also T Naude 'The value of life: A note on *Christian Lawyers Association of SA v Minister of Health*' (1999) 15(4) *South African Journal on Human Rights* 541, 553 and D Meyerson 'Abortion: The constitutional issues' (1999) 116 *South African Law Journal* 50, 57.

¹⁷¹ Conservative doctors may also have room to label the majority of pregnant minors 'incapable to give or refuse informed consent' to an abortion. See R Rebouché 'Parental involvement laws and new governance' (2011) 34

determinations enables pro-choice medical practitioners to deem incompetent children ‘competent’ so that they may authorise treatment or surgery without parental involvement. Given the power imbalances between doctors and children, this approach creates room for doctors to unduly influence young minors (sometimes unconsciously) to consent to or refuse termination of pregnancy services. Besides, there are no criminal or civil sanctions against doctors who, in good or bad faith, make wrong capacity determinations. Without some statutorily ordained age of consent, it is difficult for doctors to evaluate minors’ competences unless they request for the services of a psychiatrist or some other qualified professional.

On the positive side, an open-ended approach to individual capacities recognises every child’s capacity to consent to relevant medical procedures regardless of that child’s age and prevents the arbitrariness associated with age-based capacity presumptions.¹⁷² Pregnant minors as young as 12 years of age have the right to terminate their pregnancies provided they have the capacity for informed consent. However, these claims are built on the false premise that capacity is somewhere ‘there’ (that it can be easily determined) and that doctors are trained to determine the intellectual capacities of patients. Why not combine age (say 15 or 16 years) and the requirement for informed consent as twin factors to be considered in determining minors’ ability to consent to an abortion. If the age of consent is neither too low to risk giving autonomy to children without capacities for rational action nor too high to risk denying autonomy to children who have such capacities, such an age would act as a guideline on the age at which children roughly attain capacities for rational action. To eliminate the charge that age is rigid and arbitrary,¹⁷³ the age of consent should be tied to the idea that a child still needs to possess the capacity for informed consent to an abortion. This approach is used in the Children’s Act, but it has been argued that the age of 12 years is perhaps too low for many South African children to have acquired the capacities for rational autonomy.¹⁷⁴

Harvard Journal of Law and Gender 175 and A Bainham ‘Growing up in Britain: Adolescence in the post-Gillick era’ in JM Eekelaar and P Sarcevic (eds) *Parenthood in modern society: Legal and social issues for the twenty first century* (1993) 501, 510, who argues that regardless of the permissive nature of British health care law, parents and doctors are likely to deem children incompetent to give informed consent to abortion unless both consider the pregnant minor’s decision to abort to be in her best interests.

¹⁷² See *Christian Lawyers Association II*, para 23.

¹⁷³ *Ibid*, para 56.

¹⁷⁴ See section 3.4.1 of Chapter Five.

5.2 The need to regulate minors' refusal to terminate life-threatening pregnancies

Problems arise where a minor is deemed competent, wrongly or correctly, to possess the capacity for informed consent and refuses an abortion which a medical practitioner deems important to save the minor's life. The Choice Act promotes choice on termination of pregnancies and it does not empower doctors or the state to coerce minors to terminate their pregnancies. Several provisions of the Choice Act would not permit medical practitioners to require a competent minor to terminate her pregnancy.¹⁷⁵ The choice on whether or not to do so necessarily belongs to the woman, not the doctor or parent.¹⁷⁶ At the moment, the Choice Act's focus on the woman's right to have an abortion does not address situations where a competent minor chooses to refuse an abortion that saves her own life. As shown above, the Choice Act regulates only those situations where a pregnant minor wants to terminate her pregnancy, but the medical practitioner refuses on the basis that it is risky to do so.¹⁷⁷ It does not prescribe the action to be taken by a medical practitioner where the minor wishes to keep a pregnancy which the attending physician reasonably believes to be a threat to the minor's life. Given that informed consent is often dangerously equated to informed refusal,¹⁷⁸ a pregnant minor appears to be entitled (under the current framework) to refuse an abortion even if such refusal poses danger to the minor's life.

However, it is difficult to sustain the argument that children should be allowed to exercise autonomy in an objectively 'dangerous' manner.¹⁷⁹ To do so would be to ignore the role of children's protection rights,¹⁸⁰ particularly the right to life,¹⁸¹ in defining the scope and limits of

¹⁷⁵ Sections 2(1) and 5(1) and (2) of the Choice Act read together.

¹⁷⁶ An informed refusal is the flip side of informed consent and it can hardly be said that every pregnant child's refusal of an abortion is not in the child's best interests merely because it is irrational or unreasonable in the eyes of the doctor. See F Van Oosten 'Medical Law: South Africa' in R Blanpain and H Nys (eds) *International Encyclopaedia of Laws* (1996) 120.

¹⁷⁷ See section 4.1 of this chapter.

¹⁷⁸ F Van Oosten 'The Choice on Termination of Pregnancy Act: Some comments' (1999) 116 *South African Law Journal* 60, 66, argues that 'the right to consent without the right to refuse is a legal castratus. That the girl's ultimate decision is irrational, unreasonable, unwise or dangerous makes no difference, for this is precisely what the doctrine of informed consent, with its underlying principle of personal autonomy and self-determination, is all about'.

¹⁷⁹ See sections 3.2, 4.2 and 5.2 of Chapter Two. See also sections 4.2 of Chapter Three and 4.2 of Chapter Four.

¹⁸⁰ See sections 3.3, 4.3 and 5.3 of Chapter Two. See also sections 5.2 of Chapter Three and 5.1 of Chapter Four.

¹⁸¹ See sections 4.3 of Chapter Three and 4.3 of Chapter Four.

children's autonomy rights. Accordingly, a child who refuses an abortion which a medical practitioner believes to be important to save the child's own life may be forced to terminate her pregnancy to promote her own best medical interests.¹⁸² Yet, the Choice Act does not directly address cases where the child dangerously chooses not to terminate her pregnancy. The role of the right to life in defining the best interests of the child does not seem to permit even competent children to refuse life-saving medical procedures.¹⁸³ Consequently, there is need for a provision stipulating that where the minor's refusal to terminate her pregnancy threatens the minor's life, the Minister of Social Development or the High Court as upper guardian of all minors may authorise the termination of such a pregnancy.¹⁸⁴

6 CONCLUSION

South African law largely locates reproductive decision-making outside the reach of parental responsibility. From contraception to abortion, domestic law largely confers on minors the autonomy to make decisions without parental or state intervention. The Children's Act adopts an age-based capacity presumption, relying solely on 12 years as the minimum age at which children should be allowed to use contraception without parental consent. Unlike condoms, oral and injectable contraceptives constitute medical treatment and have well documented side effects to which children may not be subjected without informed consent. To the extent that it codifies a presumption of competence which allows incompetent children over 12 years to consent to these forms of contraception without parental consent, the Children's Act violates medico-legal ethics relating to informed consent to medical procedures and undermines the protection rights of children who experience moderate to severe intellectual developmental delay. Accordingly, section 134(2) should be amended to incorporate a 'sufficient maturity and mental capacity' test to ensure that incompetent children over 12 years do not receive contraceptive treatment without their parents' or guardian's consent.

With regards to abortion, it was shown that the Choice Act confers on children the autonomy to make personal decisions and largely limits the scope of parental responsibility. It is very

¹⁸² On the primacy of the child's best interests, see sections 4.2 of Chapter Three and section 4.2 of Chapter Four.

¹⁸³ See sections 4.3 of Chapter Three and 4.3 of Chapter Four.

¹⁸⁴ For a comparative approach, see section 5 of Chapter Five.

unequivocal in confirming that it is designed to protect women's reproductive health rights and to enable women, including minors, to make independent decisions. Doctors and the state may limit minors' autonomy in very limited circumstances, and even then, only in the second and third trimesters of pregnancy. The Choice Act relies on the child's capacity for informed consent to determine whether the child may independently consent to an abortion. This chapter has shown that while this individualised approach to capacity determinations ensures that all competent children independently consent to an abortion regardless of their ages, it is vulnerable to abuse in that it leaves wide scope for either pro-choice doctors to label incompetent children 'competent' in order to avoid seeking parental consent to an abortion or pro-life doctors to label competent children 'incompetent' in order to frustrate the child's enjoyment of reproductive autonomy.

To address these challenges, it is necessary to 'partner' the doctrine of 'informed consent' with a particular age of consent in order to provide some guidance on when children are roughly expected to acquire capacities for rational reproductive autonomy. In addition, there is need for a provision addressing situations where a competent minor chooses to refuse an abortion that saves her own life. At the moment, the Choice Act does not directly regulate choice on non-termination of pregnancy and there is need to acknowledge, legislatively, the state's duty to intervene when the pregnant minor makes a life-threatening decision not to terminate her pregnancy.

Overall, the state has (through statutory regulation) 'broken' the public/private dichotomy's hold on South African law and taken away from parents the power to make decisions on reproductive health matters affecting children. Pregnant minors with the capacity for informed consent have the right to procure an abortion the same way over 12s are entitled to use contraception without parental consent. This liberal approach to reproductive decision-making is intended to protect children from STDs, unintended pregnancies and unsafe abortion. Both the Children's Act and the Choice Act are built on the need to promote children's reproductive autonomy rights. They largely use autonomy as a means of safeguarding child protection instead of using protection rights to define the province of autonomy rights. This chapter has shown that this reversal of roles between autonomy and protection largely originates from both the highly private nature of

human sexuality and reproduction, and the practical burdens which restrictions on reproductive autonomy would impose on children.

CHAPTER SEVEN: CONCLUSION

1 SUMMARY OF FINDINGS

This study set out to examine the interface and potential tension between child participation or autonomy rights, parental responsibility and state intervention. At the heart of the problem is the extent to which children may exercise autonomy without parental (or state control) or the extent to which parents may exercise responsibilities in respect of the child without state intrusion into the ‘private’ family. The sections below recapture the main findings made in this study.

1.1 General principles and their role in the decision-making process

This study has shown that the best interests of the child, child participation and the right to life, survival and development are important principles in balancing child autonomy rights, parental responsibility and state intervention in decision-making. Under both domestic and international law, the best interests of the child is a guiding principle in all matters affecting children and a benchmark against which to measure the appropriateness of the conduct of children, parents and the state.¹ The principle primarily acts as a device for deciding whose views improve the protection of the child’s overall welfare and rights.² This way, the principle does not only enable mature children to make independent medical or reproductive decisions, but creates room for parents and the state to veto personal decisions (by the child) that threaten the child’s protection rights, particularly the right to life, survival and development.³ The importance of the principle lies in the fact that it shifts the focus of decision-makers from parental interests to the best interests of the child as a paramount consideration in decision-making. This disaggregation of interests creates room for the state to intervene in the private family to protect children’s interests and rights against infringement by parents and other holders of parental responsibility.

¹ See sections 4.2 of Chapter Three and 4.2 of Chapter Four.

² Ibid.

³ Ibid.

In international law, the right to life is a general principle to be complied with in the implementation of all children's rights.⁴ At the domestic level, the importance of the right to life is underlined by the fact that it is one of only two constitutional rights, alongside the right to dignity, from which derogation is 'entirely' prohibited during states of emergency.⁵ The negative dimension of the right to life plays an important role in balancing competing interests. Children, parents and the state must exercise their rights in ways that do not endanger the child's basic right to life, survival and development.⁶ Parents have no room for asserting parental autonomy from state interference in matters that endanger the child's life the same way the state may not exploit national sovereignty to justify the arbitrary killing of children.⁷ When children exercise autonomy rights in ways that threaten their right to life and best interests, the right to life justifies parental and state intrusion into the domain of children's autonomy. Thus, any decision which leads to the arbitrary deprivation of life should be vetoed, usually by the courts, on the basis that it is not in the best interests of the child. These principles are important in balancing children's autonomy, parental responsibility and state intervention in medical and reproductive decision-making.

As one of the general principles of children's rights, participation rights require a change of perspective in the way parents, society and the state have viewed children for ages. It underlines the fact that children should not be viewed as 'objects' of protection, but as distinct holders of rights that are separate from parental rights.⁸ Participation rights seek to challenge and eradicate exclusionary child-rearing practices and to promote the genuine inclusion of children in the decision-making process.⁹ It places children at the centre of the decision-making process and emphasises the role played by children's views in making decisions that are best for children. More importantly, the protection of participation rights implies that parents and the state may neither determine the destiny of children without giving them an opportunity to influence the decision-making process nor deny competent children the space for self determination.¹⁰ This

⁴ Section 4.3 of Chapter Three.

⁵ Section 4.3 of Chapter Four.

⁶ Sections 4.3 of Chapter Three and 4.3 of Chapter Four.

⁷ Section 4.3 of Chapter Three.

⁸ Sections 4.4 of Chapter Three and 4.4 of Chapter Four.

⁹ Section 4.4 of Chapter Three.

¹⁰ Ibid.

challenges traditional notions of children as property or citizens in-the-making¹¹ and recognises that children may possess capacities for rational autonomy earlier than is ordinarily expected by parents and the state.¹²

Under international and South African law, direct participation in decision-making is also protected as a right to which every child is entitled.¹³ At the domestic level, the Constitution and the Children's Act codify numerous procedural rights related to participation in judicial proceedings. These rights include legal representation, access to court and standing. Apart from enabling children to make rights-based claims against parents and the state, these rights connect the child's general right to express views with his or her procedural right to be heard in court proceedings.¹⁴ Parents and state agencies are bound to give due weight to the views of the child in accordance with the child's age and evolving capacities.¹⁵ This creates room for mature children to take more responsibility for personal actions. As children's capacities evolve, parents and the state become duty-bound to cede some control of the decision-making process to children.¹⁶

1.2 Parental responsibility and children's rights

One of the enduring findings made in this study is that parents and families perform an important social function in the upbringing of children.¹⁷ The importance of parental responsibility for the enjoyment of children's rights is evident from the large number of provisions committed to the regulation of family relationships in international and domestic law.¹⁸ Children's participation or autonomy rights should be read together with the discretionary 'powers' attached to the notion of parental responsibility.

¹¹ For a detailed discussion on the property theory, see sections 2.1-2.3 of Chapter Two.

¹² See section 4.4 of Chapter Three.

¹³ See sections 5.3.1 of Chapter Three and 5.2.2 of Chapter Four.

¹⁴ See section 5.2.2 of Chapter Four and 5.2.3 of Chapter Four.

¹⁵ See sections 5.3.1.2 and 6.3 of Chapter Three, and sections 5.2.1 and 6.4 of Chapter Four.

¹⁶ See sections 5.3.1.2 of Chapter Three and 5.2.1 of Chapter Four.

¹⁷ See sections 6 of Chapter Three and 6 of Chapter Four.

¹⁸ See sections 6.1 of Chapter Three and 6.2 of Chapter Four.

Three features emerged from the way international and South African law treat the interface between parental responsibility and children's rights. First, parents and families are entitled to exercise autonomy when performing their child-rearing functions. Several provisions of the CRC, the Constitution and the Children's Act place the primary responsibility for directing and guiding children on parents, guardians or other holders of parental responsibility.¹⁹ Accordingly, parents and families, ahead of all others, are the default bearers of the responsibility to make decisions concerning the care, religion, education and residence of the child.²⁰ This includes responsibility concerning medical and reproductive decisions relating to children. There is an element of autonomy from state control and from the intervention of third parties which attaches to parental responsibility, particularly in matters concerning family life, privacy and religion.²¹ In Chapter Three, this study observed that most of the relevant provisions portray the family as a mini-state in which parents are entitled to exercise wide authority in making decisions affecting children.²² This is most evident from provisions which provide that States Parties should 'respect' the rights of those responsible for guiding children.²³ However, parental responsibility should be exercised for the benefit and in the best interests of the child.

The second feature is that the state has the duty to intervene in the family when parents exercise their autonomy in a manner that is inconsistent with children's best interests, protection rights and evolving capacities.²⁴ State intervention arises from the need to protect children against the unreasonable exercise of parental responsibility.²⁵ Parents may take decisions that threaten the best interests of the child and the child's right to life and survival, especially in the context of medical treatment, surgical operations, contraception and abortion. In addition, state intervention arises from the realisation that the public/private divide, with its focus on the twin concepts of family privacy and parental autonomy, undermines public responsibility for the upbringing of children.²⁶ It questions the appropriateness of the presumption that parents know what is best for children and ensures that the rights of the child do not remain hidden under the veil of family

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Section 6.1 of Chapter Three.

²³ Ibid.

²⁴ Sections 6.2 of Chapter Three and 6.3 of Chapter Four.

²⁵ See section 6.2 of Chapter Three.

²⁶ See section 2.4 of Chapter One.

privacy.²⁷ Therefore, state intervention is only justified when it promotes the rights of the child and prevents the abuse or exploitation of children ‘while in the care of parents’.²⁸ This approach is justified by the language of ‘parental responsibility’ which introduces a paradigm shift from the traditional emphasis on parental authority over children to the duties parents owe their children.²⁹

The third feature is that the developing maturity of the child has always limited the ambit of the supervisory powers of parents and the state. As an emancipatory and protective concept, the evolving capacities of the child respectively grounds both the child’s relative autonomy and parental control.³⁰ Accordingly, the concept plays an important role in maintaining the balance between child participation, parental responsibility and state intervention.³¹ It recognises that children experience rapid growth in their ‘physical, cognitive, social and emotional functioning’; pass through zones of rational autonomy before attaining adulthood and vary in the ages at which they become capable of making particular decisions.³² As children grow older, they become less vulnerable and more mature to take responsibility for the enjoyment of their own rights. Consequently, parents and the state should ‘loosen’ their control over children and give them space to make decisions that enhance their own protection.

However, children remain subject to parental and state protection until they reach either the age of majority or the age of consent in specific areas of the law. Thus, the evolving capacities and best interests of the child; the right to life, survival and development; and protection rights play an important role in balancing child participation or autonomy rights, parental responsibility and state intervention, particularly in the context of medical and reproductive decision-making. The lack of capacities for rational autonomy grounds the child’s need for continued protection and limits their autonomy rights. Where the child makes autonomy-based claims of rights which endanger the very child’s protection rights, parents and the state are entitled to disregard the

²⁷ Ibid.

²⁸ See sections 6.2 of Chapter Three and 6.3 of Chapter Four.

²⁹ See section 2.3 of Chapter One and 6.2 of Chapter Three. See also sections 6.1 and 6.2 of Chapter Four.

³⁰ See section 5.3.1.2 and 6.3 of Chapter Three. See also sections 5.2.1 and 6.4 of Chapter Four.

³¹ Ibid.

³² Ibid.

child's views in order to protect the child from possible harm.³³ More importantly, protection rights define and limit the province of parental autonomy by stating, as a matter of law, what parents may not do when exercising parental responsibilities and rights.³⁴ The provisions entrenching protection rights largely outline the areas in which parents do not enjoy autonomy from state control and regulate the extent to which parents are entitled to make independent decisions in those areas in which they do have autonomy rights.³⁵

1.3 Medical decision-making by competent children

The Children's Act confers on competent children over the age of 12 years the autonomy to make personal decisions in the context of medical treatment and surgical operations. Children's autonomy in medical decision-making is also supported by the child's constitutional rights to dignity, access to health-related information, freedom and security of the person, and reproductive health.³⁶ These rights portray children as ends in themselves and require parents and the state to respect every child's right to determine what should be done to their bodies.³⁷ More importantly, the right to security in and control over one's body, allows every competent child to accept or deny medical treatment and surgical operations without parental consent.³⁸ Once they reach the age of 12 years, children become entitled to make personal decisions provided they have sufficient maturity to make the decision in question. Chapter Five demonstrated that while the use of age has certain advantages, the stipulated age (12 years) is very low compared to the age of consent in other jurisdictions. There is a real danger that pro-choice medical practitioners may deem incompetent children (over 12 years of age) 'competent' in order to administer medical interventions without parental consent. This may have negative effects, especially where young children are deemed competent to refuse treatment or surgery.

However, it is important to recognise that age alone does not ground autonomy in medical decision-making. A child aged 12 years or above only enjoys autonomy if they have 'sufficient

³³ See sections 5.2 of Chapter Three and section 5.1 of Chapter Four.

³⁴ Section 5.2 of Chapter Three.

³⁵ Ibid.

³⁶ See section 5.3 of Chapter Five.

³⁷ See section 5.3.2 of Chapter Four.

³⁸ See section 5.3.4 of Chapter Four.

maturity and mental capacity’ to make independent medical decisions. The statutory reference to ‘sufficient maturity’ signifies the importance of the child’s evolving capacities in determining the levels of autonomy to be enjoyed by a child in the context of medical decision-making.³⁹ This is important not only for enabling competent children to take more responsibility for medical decisions, but also for protecting incompetent children from personal decisions that are inconsistent with their own best medical interests. To this end, the Children’s Act recognises that some children experience average to severe intellectual developmental delay and may therefore lack ‘sufficient maturity’ to give informed consent to treatment even after attaining the age of 12 years.

On the whole, the Children’s Act allows competent children to claim autonomy from parental and state control in the context of treatment decisions. It disaggregates the health rights of children from those of parents and enables competent children to make independent decisions. These developments symbolise the gradual movement away from parental and family rights to the individual rights of family members, especially women and children.⁴⁰ Therefore, South African law has departed from the historical construction of children as property and recognises children as ends in themselves, even in the context of medical decision-making.

By emphasising the importance of the child’s own consent to treatment and surgery, the Children’s Act embodies a move away from the concept of parental autonomy to the child’s right to bodily self-determination.⁴¹ The reduction of the legal age of consent to 12 years recognises the autonomy rights of a large number of children historically excluded from influencing treatment decisions.⁴² This drive towards individual autonomy is evident even in the context of surgical operations as adolescents are now entitled to make these decisions and parents are only required to assist the child in giving consent. The stakes for autonomy are so high that the Children’s Act does not differentiate between the right to consent to and to refuse medical treatment. Thus competent children also have, under carefully defined circumstances, the right to

³⁹ See section 3.2 of Chapter Five. See also sections 5.3.1.2 of Chapter Three and 5.2.1 of Chapter Four.

⁴⁰ See section 3.2 of Chapter Five.

⁴¹ Ibid.

⁴² Ibid.

refuse medical treatment or surgery, provided the refusal does not undermine the child's best interests or threaten their basic right to life.⁴³

Finally, the Children's Act also allows state agencies to consent to the medical treatment of or surgery on a child if the child unreasonably refuses to give such consent. The best medical interests of the child remain the paramount consideration in determining the reasonableness of medical decisions made by mature minors.⁴⁴ As demonstrated above, the relevant provisions of the Children's Act demonstrate that individual autonomy is not an overriding value in medical decision-making by competent children.⁴⁵ The legal protection of child protection rights is meant to ensure that the state protects the child against personal decisions that are not in their best interests.⁴⁶ As rights and general principles, the best interests of the child⁴⁷ and the right to life, survival and development⁴⁸ are designed to ensure that children do not exercise autonomy in ways that are detrimental to their own lives, development and well-being. These principles demonstrate that personal decisions, by the child, which threaten the child's right to life are likely to be regarded as 'unreasonable' and to attract state intervention under the Children's Act.⁴⁹

1.3.1 The need for a review of the age of 12 years

It has been shown that in comparative terms, the age of consent is very low.⁵⁰ This problem becomes more acute if a 12 year old is deemed competent to make an informed refusal of life-sustaining treatment, especially if the child is an orphan or living in a child-headed household or in the streets. Chapter Five relied on brain science research and the sociology of childhood to demonstrate the correctness of the claim that 12 years is too low an age for the majority of South African children to have attained the ability to make informed medical decisions.⁵¹ It has been

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ See sections 5.2 of Chapter Three and 5.1 of Chapter Four.

⁴⁷ See sections 4.2 of Chapter Three and 4.2 of Chapter Four.

⁴⁸ See sections 4.3 of Chapter Three and 4.3 of Chapter Four.

⁴⁹ Ibid.

⁵⁰ Section 3.4.1 of Chapter Five.

⁵¹ Ibid.

shown that parts of the brain responsible for high order or executive cognitive functions such as controlling impulses, calming emotions, prioritising thought, imagining and informing considered and rational decision-making, continue to develop through adolescence and young adulthood (18-25 years).⁵² This places doubt on the correctness of the statutory ordination of 12 years as the age at which children attain capacities for rational autonomy. Besides, group solidarity in South Africa's communitarian societies and the language of duties (particularly the child's duty to respect adults) have not only been shown to affect the child's capacity or willingness to exercise decisional autonomy rights early in the life course, but to make the need to listen to children less imperative.⁵³ Whilst this thesis does not stipulate what the age of consent to treatment or surgery should then be, it found that there is need to review the age of consent to medical treatment and demonstrated that the age of consent should be informed by empirical research into children's capacities for rational autonomy in specific decision-making contexts. On the whole, the evidence tends to suggest that in many contexts, children become competent to make rational decisions during late adolescence (14-17 years in this study).

1.3.2 The need to define 'sufficient maturity and mental capacity'

The Children's Act does not define 'sufficient maturity and mental capacity'. In Chapter Five, this study demonstrated that this is an unwelcome omission because the ultimate decision on whether an adolescent is entitled to make independent treatment decisions turns on whether they have 'sufficient maturity and mental capacity' to understand the benefits and risks of the treatment in question.⁵⁴ Worststill, the Children's Act does not specify who determines whether a child possesses 'sufficient maturity and mental capacity' to give consent to treatment or surgery. For a large number of cases that never reach the courts, capacity-determinations are likely to be made by treating physician who lack the skills needed to determine whether a child is competent enough to make rational medical decisions.⁵⁵

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Section 3.4.2 of Chapter Five.

⁵⁵ Ibid.

The lack of clarity on what ‘sufficient maturity’ means leads to variations in capacity determinations and may be abused at either end of the spectrum. First, it allows pro-choice physicians to deem the majority of incompetent adolescents ‘competent’ and to administer medical interventions based on the adolescent’s uniformed choice. This may turn out to be a serious problem in the context of end-of-life decision-making by unaccompanied adolescents who have no parents or live in child-headed households or in the streets. Second, conservative doctors who are sceptical about children’s developing maturity may deny competent adolescents decisional autonomy by simply making a finding that they lack ‘sufficient maturity’ to make independent treatment decisions. There is a real danger of conflict of interest because the same doctor who should not proceed without the child’s informed consent to treatment determines whether the child possesses ‘sufficient maturity and mental capacity’ to give informed consent to such treatment.⁵⁶

The current legal framework leaves wide room for medical practitioners to unduly influence children, especially where the latter turn up at hospitals without any parent, guardian or caregiver. Against this background, it may be necessary to provide guidance on the sort of factors to be considered in determining whether the child is competent enough to make a particular decision.⁵⁷ This may go a long way in helping judges and doctors to determine whether children have the capacity to deny or accept medical interventions. The fact that neither doctors nor judges are specifically trained to make capacity determinations adds impetus to this proposition. This study suggested some useful guidelines to capacity determinations and demonstrated how the terms ‘sufficient maturity and mental capacity’ are linked to the doctrine of informed consent.⁵⁸

1.4 Medical decision-making for ‘incompetent’ children

In non-emergency situations, parents have the primary responsibility for making medical decisions for children who are either below the age of 12 years or over that age, but lacking the

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

capacity for rational autonomy.⁵⁹ Children below the age of 12 years have no legal capacity to make independent decisions on whether to accept or deny medical interventions and the Children's Act is very unequivocal in conferring on parents the responsibility for making relevant decisions on behalf of such children.⁶⁰ This lack of capacity is statutorily constructed and it matters not that the child in question factually possesses the 'sufficient maturity and mental capacity' required to make independent medical choices.⁶¹ For the very young, the legislative scheme for consent to medical treatment and surgical operations relies solely on age as a ground for denying them autonomy in decision-making.

Adolescents who lack 'sufficient maturity and mental capacity' to understand the benefits and risks associated with specific medical interventions also lack the legal capacity to give informed consent to such interventions unless the intervention in question is meant to terminate a pregnancy.⁶² Parents or guardians have the responsibility to make decisions on behalf of this category of children. However, parental consent is not required for emergency medical interventions or access to abortion services.⁶³

The responsibilities that parents or guardians have in making medical decisions for incompetent adolescents or children under 12 years, is subject to section 31 of the Children's Act. Parents are bound to listen to children falling under either of these categories and to give due weight to such views in light of the child's developing competences. Therefore, parental responsibility does not eclipse the participation rights of young children or adolescents experiencing moderate to severe intellectual developmental delay. While the parent or guardian has the power to determine whether young or incompetent children should receive medical treatment, they are required to give such children meaningful opportunities for participation. This emphasises the idea that no one should decide the destiny of children who are capable of self-expression without involving them in the decision-making process.

⁵⁹ See section 3.3 of Chapter Five.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² See section 3.3 of Chapter Five.

⁶³ See section 3.1 of Chapter Five.

Finally, the autonomy parents enjoy in making medical decisions for certain categories of children is not absolute as it should be consistent with the child's best medical interests, evolving capacities and right to life. These principles and rights create room for a great deal of state supervision of parental decisions, especially where such decisions threaten the child's right to life.⁶⁴ When a parent or guardian unreasonably refuses to grant consent to important medical interventions, ministerial or court-ordered consent may be sought to ensure that the child receives treatment or undergoes surgery.⁶⁵ This signifies a revolutionary departure from the public/private divide and its characterisation of the parent-child relationship as an essentially 'private' relationship to be insulated from state intervention.⁶⁶ The Children's Act recognises that parents sometimes act in ways that threaten the rights of children and permits the state to intervene in the family to promote children's health rights.⁶⁷ This approach increases public accountability for children and correctly portrays parents as fiduciaries to be 'removed' from the office of parenthood if they act in ways that undermine children's rights.⁶⁸ Refusal of treatment and surgery, in many cases, leads to serious consequences such as death, serious injury or permanent disability. Thus, the Children's Act recognises the role played by the right to life in defining the best interests of the child and limiting parental autonomy in medical decision-making.

1.5 Emergency treatment and the value of human life

Generally, the rules governing consent to medical treatment or surgical operations are disregarded in the context of emergencies and hospital authorities may bypass such rules to prevent death, serious injury or permanent disability. The relevant provisions of the Children's Act seek to ensure that the legal requirement of consent is not applied in a manner that delays the treatment of children in emergency situations.⁶⁹ In such situations, waiting for the parent or the guardian to give consent to treatment would defeat the purpose of obtaining such consent.⁷⁰

⁶⁴ See section 5 of Chapter Five.

⁶⁵ See sections 5.1 and 5.2 of Chapter Five.

⁶⁶ See section 5 of Chapter Five.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ See section 4 of Chapter Five.

⁷⁰ Ibid.

Postponing the prescribed treatment or operation in order to receive parental consent would not only announce an undesirable return to the historical focus on family privacy and parental autonomy, but would also be inimical to the best medical interests of the child.⁷¹

On the whole, the Children's Act enables health professionals who are 'on the ground' to make emergency treatment decisions that promote the child's best interests and right to life, survival and development. This shows that the best interests of the child remain the primary consideration when making medical decisions in emergency situations.⁷² At the heart of the definition of the child's best interests is the right to life and the need to save the child's life even without obtaining the consent of the child, parents or the state.⁷³ The need to protect the child from such imminent dangers as death, grave injury or permanent disability, overrides the autonomy rights of parents, guardians or children in emergency situations.⁷⁴ This is consistent with the observation made in earlier chapters that the child's basic right to life, survival and development is very important in giving meaning to the best interests of the child.⁷⁵

1.6 Reproductive decision-making

From contraception to abortion, South African law largely locates reproductive decision-making outside the reach of parental responsibility and confers on minors the autonomy to make decisions without parental or state intervention. Overall, the state has (through statutory regulation) 'broken' the public/private dichotomy's hold on South African law and taken away from parents the power to make decisions on reproductive health matters affecting children. Pregnant minors with the capacity for informed consent have the right to procure an abortion the same way over 12s are entitled to use contraception without parental consent. This liberal approach to reproductive decision-making is intended to protect children from STDs, unintended pregnancies and unsafe abortion.

⁷¹ Ibid.

⁷² Ibid. See also sections 4.3 of Chapter Three and 4.3 of Chapter Four.

⁷³ See sections 4.2 of Chapter Three and 4.2 of Chapter Four.

⁷⁴ See section 4 of Chapter Five. Compare with sections 5.2 of Chapter Three and 5.1 of Chapter Four.

⁷⁵ See sections 4.3 of Chapter Three and 4.3 of Chapter Four.

Both the Children's Act and the Choice Act largely use autonomy as a means of protecting children instead of using protection rights to define the province of autonomy rights. This reversal of roles between autonomy and protection largely originates from both the highly private nature of human sexuality and reproduction, and the need to protect children from STDs, unwanted pregnancies and unsafe abortion.⁷⁶ To a larger extent, reproductive autonomy rights enable children to make decisions on intimate matters of life and to overcome the practical challenges associated with the notion of parental consent. Children have relative autonomy in those areas of the law which relate to sensitive matters over which parents are likely to hold different views.⁷⁷ This is particularly so if such autonomy is exercised by a mature minor in a manner that enhances the protection of the minor's right to life, survival and development. Due to the confidential nature of sexuality and reproduction, minors tend to resort to unsafe abortion if required to seek the consent of parents and this practice is perhaps more harmful to the child's best interests than access to safe abortion without parental consent. Thus, the child's best interests and right to life are usually better promoted when competent children are allowed to make informed reproductive choices.

South African law adopts an age-based capacity presumption, relying solely on 12 years as the minimum age at which children become entitled to use contraception without parental consent.⁷⁸ In this respect, the Children's Act codifies child liberation ideology, particularly the Farson-Holt autonomy thesis,⁷⁹ in as far as it permits over 12s who lack 'sufficient maturity and mental capacity' to understand the nature, benefits and risks of contraceptive treatment.⁸⁰ This is particularly because the age of consent is very low⁸¹ and the relevant provisions do not refer to the idea that the child's capacities should have evolved to such an extent that the child is capable of understanding what is involved.⁸² Accordingly, the Children's Act undermines the significance of the child's evolving capacities in determining the measure of autonomy to be extended to children.⁸³ This study demonstrated that even if it were assumed that an average

⁷⁶ See sections 2.1, 2.2 and 3.4 of Chapter Six.

⁷⁷ See sections 5.3.2 of Chapter Three and 5.3.1 of Chapter Four.

⁷⁸ See sections 2.1-2.2 of Chapter Six.

⁷⁹ See section 4.2 of Chapter Two.

⁸⁰ See section 2.2 of Chapter Six.

⁸¹ On why the age of 12 years is very low, see section 3.4.1 of Chapter Five.

⁸² See section 2.3 of Chapter Six.

⁸³ See sections 5.3.1.2 and 6.3 of Chapter Three, and 5.2.1 of Chapter Four.

South African child acquires the capacity to understand the nature, risks and benefits of all contraceptive interventions, the failure to combine the criterion of age with the child's developing maturity would still allow children who experience moderate to severe developmental delay to make reproductive decisions without the capacity for informed consent to such interventions.⁸⁴ Thus, this category of children has been unjustifiably abandoned to their reproductive autonomy rights and this is not in the best interests of the child.

Unlike condoms, oral and injectable contraceptives constitute medical treatment and have well documented side effects (including permanent infertility in extreme cases) to which children may not be subjected without giving informed consent.⁸⁵ To the extent that it codifies a presumption of competence which allows incompetent children over 12 years to consent to oral and injectable contraception without parental consent, the Children's Act violates medico-legal ethics relating to informed consent and undermines the protection rights of children who experience moderate to severe developmental delay.⁸⁶ Accordingly, section 134(2) should be amended to incorporate a 'sufficient maturity and mental capacity' test to ensure that incompetent children over 12 years do not receive contraceptive treatment without parental consent.⁸⁷

With regards to abortion, the Choice Act confers on all pregnant minors the autonomy to make personal decisions and expressly provides that it is designed to enable women to make independent reproductive decisions.⁸⁸ The movement towards recognising children's reproductive autonomy is evident from the following considerations: (a) abortion is now regulated by the Choice Act which emphasises the woman's right to make reproductive choices; (b) the Choice Act defines a woman as a female person of any age; (c) pregnancy may be terminated upon the request of a pregnant woman; (d) the termination of pregnancy may take place *only* with the *informed consent* of the pregnant woman; (e) 'no consent other than that of the pregnant woman [is] required for' a termination of pregnancy; (f) doctors are bound only to advise the pregnant minor to consult with her parents and the termination of pregnancy must still be carried out if the minor refuses to consult with her parents; and (g) even where the minor

⁸⁴ See section 2.2 of Chapter Six.

⁸⁵ See section 2.3 of Chapter Six.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ See sections 3.1, 3.3 and 3.4 of Chapter Six.

chooses to consult with the parents, only the consent of the pregnant minor (where such minor is competent) is required for the termination of pregnancy.⁸⁹ Very young pregnant minors may give informed consent to the termination of pregnancy provided they have the capacity for informed consent.

The Choice Act solely relies on the child's capacity for informed consent to determine whether the child may independently consent to an abortion. This study has shown that while this individualised approach to capacity determinations ensures that all competent children independently consent to an abortion regardless of their ages, it is vulnerable to abuse in that it leaves wide scope for either pro-choice doctors to label incompetent children 'competent' in order to avoid having to seek parental consent to an abortion or pro-life doctors to label competent children 'incompetent' in order to frustrate the child's reproductive autonomy.⁹⁰ In order to address these challenges, it is necessary to 'partner' the doctrine of 'informed consent' with a minimum age of consent in order to provide some guidance on when children are roughly expected to acquire capacities for rational reproductive autonomy.⁹¹

Finally, there is need for a provision addressing situations where a competent minor chooses to refuse an abortion that saves her own life.⁹² At the moment, the Choice Act does not directly regulate choice on non-termination of pregnancy and there is need to acknowledge, legislatively, the state's duty to intervene when the pregnant minor makes a life-threatening decision not to terminate her pregnancy.⁹³ This omission may turn out to be detrimental to the life and best interests of competent children who choose not to terminate life-threatening pregnancies. While the best interests of the child govern almost every area of the law relating to children,⁹⁴ the Choice Act stipulates that 'notwithstanding any other law', only the consent of the pregnant woman is required for the termination of a pregnancy. This suggests that no woman may be forced to have an abortion. The focus on informed consent to and choice on termination of

⁸⁹ See sections 3.2-3.5 of Chapter Six.

⁹⁰ See section 5.1 of Chapter Six.

⁹¹ Ibid.

⁹² See section 5.2 of Chapter Six.

⁹³ Ibid.

⁹⁴ See section 4.2 of Chapter Three and 4.2 of Chapter Four.

terminancy may negatively affect pregnant minors who refuse an abortion that is thought to be in their best interests and there is need to directly regulate this area.

2 CONCLUSION

In general, the findings made in this study do not recommend any major changes to the legal framework governing child autonomy rights, parental responsibility and state intervention in medical and reproductive decision-making. This study has shown that the legal framework governing consent to medical treatment and surgical operations confers on adolescents the autonomy to make independent medical decisions provided they have sufficient maturity to do so. In this respect, the Children's Act uses age and the evolving capacities of the child to draw the levels of autonomy and protection to be enjoyed by the child. In addition, the child may not exercise autonomy in a manner that is inconsistent with their best interests, protection rights and right to life. To this end, the Children's Act properly allows the state to intervene when the child unreasonably refuses important medical interventions.

However, the age of consent (12 years) is very low and possibly allows young children to make decisions over which they may lack competences. This is particularly so where the child is not assisted by an adult and seeks medical attention from a pro-choice doctor who is unwilling to include holders of parental responsibility in the decision-making process. The evidence from neuroscientists tends to suggest that in many contexts, children become competent to make decisions during late adolescence (15-17 years in this study). Besides, the emphasis on respect and, in some communities, group solidarity marginalises young people and further limits children's capacities to make treatment decisions at the age of 12 years. Sociological theory,⁹⁵ particularly its recognition of the role of culture and context in shaping the child's worldview and acquisition of capacity for rational autonomy, does not seem to support the view that many South African become capable of making independent treatment decisions at the age of 12 years.

Another related challenge is that the Children's Act neither defines 'sufficient maturity and mental capacity' nor states the person or agency responsible for making the decision on whether

⁹⁵ See sections 6.1-6.3 of Chapter Two.

the child possesses these attributes. This study has shown that the relevant provisions may be abused by liberal and conservative decision-makers to expand or limit the child's decisional autonomy. The fact that there are no guidelines as to what constitutes 'sufficient maturity' and that doctors hardly know how to determine the child's capacity for rational autonomy means that provisions of the Children's Act may be used both to abandon children to their autonomy and to deny them decisional autonomy even where they have the capacity for rational action. Nonetheless, the Children's Act does already support the legal framework proposed in this study in that it provides for a specific age of consent (albeit at a lower age) and informed consent, especially in the context of routine medical treatment and surgical operations. My concern in relation to the provisions regulating consent to general medical treatment and surgery is only limited to the stipulated age consent.

This study demonstrated that South African law permits adolescents to use contraceptives and to terminate their pregnancies without parental consent. This liberal approach to reproductive decision-making is motivated by the need to protect children from unsafe sex, sexually transmitted diseases, unwanted pregnancies, unsafe abortions and death. In this respect, parental responsibility in reproductive decision-making has been largely shelved, partly because the need to protect children requires that competent minors be allowed confidential access to contraception and abortion services. Thus, the relevant provisions are in the best interests of the child and promote the child's right to life, survival and development.

However, there is need to incorporate a 'sufficient maturity and mental capacity' test into the legal regime governing access to contraceptives other than condoms. As shown above, oral and injectable contraceptives are a form of medical treatment and may have serious consequences, including permanent infertility, to which the child should give informed consent. Whilst medical practitioners have the duty to explain to sexually active adolescents the side effects of every contraceptive intervention, this duty does not change anything if a child over 12 years lacks the capacity to understand what is involved. This study has shown that the statutory reliance on age as the sole factor in determining the child's capacity to use contraceptives independently overlooks the protection rights of adolescents experiencing moderate to severe intellectual developmental delay.

In the context of abortion, there is need to stipulate an age of consent. This is because the open-ended approach to capacity determinations, whilst very inclusive in nature, is vulnerable to abuse in that it leaves wide scope for medical practitioners either to label incompetent children ‘competent’ in order to avoid having to seek parental consent to an abortion or to label competent children ‘incompetent’ in order to frustrate the child’s reproductive autonomy.⁹⁶ Therefore, it is necessary to ‘partner’ the doctrine of ‘informed consent’ with a minimum age of consent in order to provide some guidance on when children are approximately expected to acquire capacities for rational autonomy.

Finally, it is necessary to regulate cases where an adolescent refuses to terminate a pregnancy which the medical practitioner reasonably believes to be life-threatening. The Choice Act promotes choice on termination of pregnancies and it does not empower doctors or the state to coerce minors to terminate their pregnancies.⁹⁷ Several provisions of the Choice Act would not permit medical practitioners to require a competent minor to terminate her pregnancy. The choice on whether or not to do so necessarily belongs to the woman, not the doctor or parent.⁹⁸ Given that informed consent is often dangerously equated to informed refusal, a pregnant minor appears to be entitled (under the current framework) to refuse an abortion even if such refusal poses danger to the minor’s life.⁹⁹

⁹⁶ See section 5.1 of Chapter Six.

⁹⁷ See sections 5.2 of Chapter Six.

⁹⁸ Ibid.

⁹⁹ Ibid.

BIBLIOGRAPHY

Books

Abrahams K and Matthews T *Promoting children's rights in South Africa: A handbook for members of Parliament* (2011) Parliament of the Republic of South Africa, Cape Town.

Alderson P *Children's consent to surgery* (1993) Open University Press, Buckingham.

Alderson P *Young children's rights: Exploring beliefs, principles and practice* 2 ed (2008) Jessica Kingsley Publishers, London.

Alen A, Vande Lanotte J, Verhellen E, Ang F, Berghmans E and Verheyde M (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (2006) Martinus Nijhoff Publishers, Leiden.

Alston P, Parker S and Seymour J (eds) *Children, rights and the law* (1992) Clarendon Press, Oxford

Ang F, Berghmans E, Cattrisse L, Delens-Ravier I, Delplace M, Staelens V, Vandewiele T, Vandresse C and Verheyde M *Participation rights of children* (2006) Intersentia, Antwerpen and Oxford.

Aquinas T *Commentary on Aristotle's Politics* Reagan RJ (trans) (2007) Hackett Publishing, Indianapolis and Cambridge.

Archard D *Children: Rights and childhood*, 2 ed (2004) Routledge, London and New York.

Aries P *Centuries of Childhood* (1962) Vintage Books, New York.

Bainham A *Children, parents and the state* (1988) Sweet & Maxwell, London.

Bainham A *Children – The new law, the Children Act 1989* (1990) Jordan and Sons Ltd, Bristol.

Bainham A, Sclater SD and Richards M (eds) *What is a parent? A socio-legal analysis* (1999) Hart Publishers, Oxford.

Barendt E *Freedom of Speech* 2 ed (2005) Oxford University Press, Oxford.

Barnard AH, Cronje DSP and Olivier PJJ *The South African law of persons and family law* 3 ed (1986) Durban, Butterworths.

Barnett H *Introduction to feminist jurisprudence* (1998) Cavendish, London and Sydney.

Barton C and Douglas G *Law and parenthood* (1995) Butterworths, London.

Bennett TW *Sourcebook of African customary law for Southern Africa* (1991) Juta, Cape Town.

Bentham J *An introduction to the principles of morals and legislation* JH Burns and HLA Hart (eds) (1970) The Athlone Press, London.

Berlin I *Four essays on liberty* (1979) Oxford University Press, Oxford.

Bledsoe CH *Women and marriage in Kpelle society* (1980) Stanford University Press, Stanford, CA.

Boberg PQR *Law of persons* 1 ed (1977) Juta, Cape Town.

Boezaart T *Law of persons* 5 ed (2010) Juta, Cape Town.

Borkowski A and Du Plessis P *Textbook on Roman law* 3 ed (2005) Oxford University Press, Oxford.

Bossuyt M *Guide to the 'travaux Préparatoires' of the International Covenant on Civil and Political Rights* (1987) Martinus Nijhoff Publishers, Dordrecht.

Brey I, Gooskens I, Kahn L, Moses S and Seekings J *Growing up in the new South Africa* (2010) Human Sciences Research Council Press, Cape Town.

Bridgeman J *Parental responsibility, young children and healthcare law* (2007) Cambridge University Press, Cambridge.

Bridgeman, J Keating H and Lind C (eds) *Responsibility, law and the family* (2008) Ashgate, Aldershot.

Bridgeman J and Monk D (eds) *Feminist perspectives on child law* (2000) Cavendish, Great Britain.

Buchanan AE and Brock DW *Deciding for Others: The Ethics of Surrogate Decision-Making* (1989) Cambridge University Press, Cambridge and New York.

Burchell J *Principles of criminal law* 4 ed (2013) Juta, Cape Town.

Burman S *Growing up in a divided society: The contexts of childhood in South Africa* (1986) Ravan Press, Johannesburg.

Campbell TD and Sadurski W (eds) *Freedom of Communication* (1994) Dartmouth, Aldershot.

Castelle K *In the child's best interest* 3 ed (1990) Defense for Children International, Philadelphia.

Cheadle H, Davis DM and Haysom NRL (eds) *South African Constitutional Law: Bill of Rights* 2 ed (2011) LexisNexis, Durban.

Chirwa D *Human rights under the Malawian Constitution* (2011) Juta, Cape Town.

Cohen CP and Davidson HA (eds) *Children's rights in America: UN Convention on the Rights of the Child compared with United States law* (1990) American Bar Association, Washington DC.

Cohen R, Hyden G and Nagan WP *Human rights and governance in Africa* (1993) University Press of Florida, Gainesville, Tallahassee and Tampa.

Cook RJ, Dickens BM and Fathalla MF *Reproductive health and human rights: Integrating medicine, ethics and law* (2003) Oxford University Press, Oxford.

Cretney SM and Masson JM *Principles of family law* 6 ed (1997) Sweet and Maxwell, London.

Cronje DSP and Heaton J *South African family law* 2 ed (2004) LexisNexis Butterworths, Durban.

Cronje DSP and Heaton *The South African law of persons* 3 ed (2008) LexisNexis, Durban.

Currie I and De Waal J *The Bill of Rights Handbook* (2005) Juta, Cape Town.

Currie I and De Waal J *The Bill of Rights Handbook* 6 ed (2013) Juta, Cape Town.

Dada MA and McQuoid-Mason DJ *Introduction to Medico-legal Practice* (2001) Butterworths, Durban.

Davel CJ and Jordaan RA *Law of persons* (2005) Juta, Cape Town.

Detrick S *A commentary on the United Nations Convention on the Rights of the Child* (1999) Martinus Nijhoff Publishers, The Hague.

Detrick S (ed) *The United Nations Convention on the Rights of the Child: A guide to the travaux preparatoires* (1992) Martinus Nijhoff Publishers, Dordrecht.

Dingwall R, Eekelaar J and Murray F *The protection of children: State intervention and the family* (1983) Averbury, Aldershot.

Donnelly J *Universal human rights in theory and practice* 3 ed (2013) Cornell University Press, New York.

Du Plessis L and Corder H *Understanding South Africa's transitional Bill of Rights* (1994) Juta, Cape Town.

Dutschke M and Abrahams K *Children's right to maximum survival and development* (2006) Children's Institute, University of Cape Town, Cape Town.

Dworkin R *Life's dominion: An argument about abortion, euthanasia and individual freedom* (1993) Knopf, New York.

Dworkin R *Taking rights seriously* (1977) Harvard University Press, Cambridge, MA.

Eekelaar J *Regulating divorce* (1991) Oxford University Press, Oxford.

Elster J *Solomonic judgments: Studies in the limitations of rationality* (1989) Cambridge University Press, Cambridge.

Fagan PF *How the UN Conventions on women's and children's rights undermine family, religion and sovereignty* (2001) Heritage Foundation, Washington DC.

Farson R *Birthrights: A Bill of Rights for Children* (1974) Macmillan, New York.

Fick A, Bosman-Swanepoel HM and Strydom NA *Custody and visitation disputes: A practical guide* (1998) Butterworths, Durban.

Filmer R, *Patriarcha and other political works of Sir Robert Filmer* Laslett P (ed) (1653) (1949) Blackwell, Oxford.

Firestone S *The dialectic of sex: The case for feminist revolution* (1970) William Morrow and Company, Inc, United States.

Foster H *A bill of rights for children* (1974) Charles C Thomas Publishers, Springfield.

Francis R and Johnston C *Medical treatment: Decisions and the law* (2001) Butterworths, London.

Freeman M (ed) *Children's rights* Vol 1 (2004) Ashgate, Dartmouth.

Freeman M (ed) *Children's rights: A comparative perspective* (1996) Dartmouth Publishing Company, Aldershot.

Freeman M and Veerman P (eds) *Ideologies of children's rights* (1992) Kluwer Academic Publishers, New York.

Freeman MD *The moral status of children: Essays on the rights of the child* (1997) Martinus Nijhoff Publishers, The Hague.

Freeman M *The rights and wrongs of children* (1983) Frances Pinter, London.

Giddens A *Central problems in social theory: Action, structure and contradiction in social analysis* (1979) University of California Press, Berkeley and Los Angeles.

Goldstein J, Freud A and Solnit A *Beyond the best interests of the child* (1980) The Free Press, New York.

Goldstein J, Freud A and Solnit A *Beyond the best interests of the child* (1980) Free Press, New York.

Goody E *Context of kinship: An essay in the family sociology of the Gonja of Northern Ghana* (1973) Cambridge University Press, Cambridge.

Gotlieb D (ed) *Children's liberation* (1973) Prentice Hall, New York.

Grisso T and Schwartz RG (eds) *Youth on trial: A developmental perspective on juvenile justice* (2000) University of Chicago Press, Chicago and London.

Gross B and Gross R (eds) *The children's rights movement* (1977) Anchor Doubleday, New York.

Hagger L *The child as vulnerable patient: Protection and empowerment* (2009) Ashgate, Farnham.

Harris J *The value of life: An introduction to medical ethics* (1985) Routledge and Kegan Paul, London.

Herring J *Family law* 3 ed (2007) Pearson.

Herring J *Medical law and ethics* (2006) Oxford University Press, Oxford and New York.

Hobbes T *De Cive* H Warrender (ed) (1588-1679) (1983) Oxford University Press, Oxford.

Hobbes T *The Leviathan* JCA Gaskin (ed) (1588-1679) (1998) Oxford University Press, Oxford.

Hodgkin R and Newell P *Implementation handbook for the Convention on the Rights of the Child* 3 ed (2007) UNICEF, New York.

Hoggett BM *Parents and children: The law of parental responsibility* (1993) Sweet and Maxwell, London.

Hoggett BM and Pearl DS *The family, law and society: Cases and materials* (1991) Butterworths, Toronto.

Holt J *Escape from childhood* (1975) Vintage Books, New York.

Holzscheiter A *Children's rights in international politics: The transformative power of transnational discourse* (2010) Palgrave Macmillan, Basingstoke.

Illich I *Deschooling society* (1971) Calder and Boyers, London.

James A and Prout A (eds) *Constructing and reconstructing Childhood* 2 ed (1997) Falmer Mress, Basingstoke.

Jamieson L and Lake L *Children's Act guide for health professionals* 5 ed (2013) Children's Institute, University of Cape Town, Cape Town.

Jebb E *International responsibilities for child welfare* (1927) Save the Children Union, Geneva.

Jenks C *Childhood* (2005) Routledge, London and New York.

Johnson V, Ivan-Smith E, Gordon G, Pridmore P and Scott P (eds) *Stepping forward: Children and young people's participation in the development process* (1998) Intermediate Technology Development Group, United Kingdom.

Kaime T *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (2009) Pretoria University Law Press, Pretoria.

Kant E *Groundwork of the metaphysic of morals* HJ Paton (trans (1956) Harper and Row, New York.

Kant I *The metaphysical elements of justice* J Ladd (ed) (1999) Hackett Publishing Company, Indianapolis.

Kramer MH, Simmonds NE and Steiner H (eds) *A debate over rights: Philosophical inquiries* (1998) Oxford University Press, Oxford.

Landers C *Early child development summary report* (1989) UNICEF, New York.

LeBlanc LJ *The Convention of the Rights of the Child: United Nations Law Making on Human Rights* (1995) University of Nebraska Press, Lincoln.

Lee and Honoré *Family, things and succession* Erasmus HJ, Van der Merwe CG and Van Vyck AH (eds) 2 ed (1983) Butterworths, Durban.

Lash JP *Eleanor: The years alone* (1972) Norton and Company, New York.

Lowe N and Douglas G *Bromley's family law* 10 ed (2007) Oxford University Press, Oxford.

Locke J *Two treatises of government* (1690) P Laslett (ed) (1988) Cambridge University Press, Cambridge.

Mackinnon CA *Towards a feminist theory of the state* (1989) Harvard University Press, Cambridge.

Mason JK and McCall RA Smith *Law and medical ethics* 5 ed (1999) Butterworths, London, Dublin and Edinburgh.

May J *Changing family changing laws* (1977) Mambo Press, Gweru.

McQuoid-Mason D *Law of Privacy in South Africa* (1978) Juta, Cape Town.

Medical Protection Society, *Consent to Medical Treatment in South Africa - An MPS Guide* 2 ed (2010) Medical Protection Society, South Africa.

Mill JS *On liberty* (1859) Manis JM (ed) (1998) Electronic Classics Series, The Pennsylvania State University.

Mill JS *Utilitarianism, On Liberty, Essay on Bentham* Warnock M (ed) (1962) William Collins and Son, Glasgow.

Milton JRL *South African criminal law and procedure Vol II Common law crimes* 3 ed (1996) Juta, Kenwyn

Minow M *Making all the difference: Inclusion, exclusion and American law* (1990) Cornell University Press, Ithaca and New York.

Mnookin R *In the best interests of children* (1985) Freeman and Co, New York.

Mnookin RH and Weisberg DK *Children, family and state: Problems and materials on children and the law* 6 ed (2009) Aspen Publishers, New York.

Moller-Okin S *Women in Western political thought* (1979) Princeton University Press, Ewing, New Jersey.

Montgomery J *Health care law* 2 ed (2002) Oxford University Press, Oxford.

Morrison W *Jurisprudence: From the Greeks to postmodernism* (1997) Cavendish, London.

Mower Jr, AG *The Convention on the Rights of the Child* (1997) Greenwood Press, London.

Mushcroft S *Children's rights: Reality or rhetoric? The UN Convention on the Rights of the Child: The first ten years* (1999) International Save the Children Alliance, London.

Neethling J, Visser PJ and Potgieter JM *Neethling's law of personality* (1996) Juta, Cape Town.

O'Donovan K *Family law matters* (1993) Pluto Press, London.

Ollendorff R (ed) *Children's rights: Toward the liberation of the child* (1971) Praeger, New York and Washington, DC.

Oppong C *Growing up in Dagbon* (1973) Ghana Publishing Corp, Tema.

Parkinson P and Cashmore J *The voice of the child in family disputes* (2008) Oxford University Press, Oxford.

Pateman C *The sexual contract* (1988) Polity Press, United Kingdom.

Pellow D *Women in Accra: Options for autonomy* (1977) Algonac, Michigan.

Piaget J *Six psychological studies* Alkind D (ed) (1967) Vintage Books, New York.

Plato *The Republic* B Jowett (trans) (360 BC) (1998-2013) Electronic Classics Series, The Pennsylvania State University.

Pollock F and Maitland FW *A history of English law before the time of Edward I*, 2 ed (1898) II Cambridge University Press, Cambridge.

Postman N *The disappearance of childhood* (1994) Vintage Books, New York.

Probert R *Cretney and Probert's family law* 7 ed (2009) Sweet and Maxwell, London.

Probert R, Gilmore S and Herring J (eds) *Responsible parents and parental responsibility* (2008) Hart Publishing, Oxford.

Rawls J *A theory of justice* (1971) Harvard University Press, Cambridge, MA.

Raz J *The morality of freedom* (1986) Oxford University Press, Oxford.

Robinson JA *The law of children and young persons in South Africa* (1997) Butterworths, Durban.

Ruppel OC *Children's rights in Namibia* (2009) Macmillan Publishers, Windhoek.

Rwezaura BA *Traditional family law and change in Tanzania* (1985) Nomos, Baden-Baden.

Sedletzki V *Championing children's rights: A global study of independent human rights institutions for children* (2013) UNICEF, New York.

Seekings J and Nattrass N *Class, race and inequality in South Africa* (2005) Yale University Press, New Haven.

Simmons AJ *The Lockean theory of rights* (1992) Princeton University Press, Princeton.

Slabbert MN *Medical law in South Africa* (2011) Wolters Kluwer Law and Business, The Netherlands.

Smart C and Sevenhuijsen S (eds) *Child custody and the politics of gender* (1989) Routledge, London.

Spiro E *Law of parent and child* 4 ed (1985) Juta, Cape Town.

Steinbock B *Life before birth: The moral and legal status of embryos and fetuses* (1992) New York, Oxford University Press.

Strauss SA *Doctor, patient and the law* 3 ed (1991) JL Van Schaik Publishers, Pretoria.

The Presidency of the Republic of South Africa, *Situation analysis of children in South Africa* (2009) The Presidency of the Republic of South Africa, Pretoria.

Turmel A *A historical sociology of childhood: Developmental thinking categorisation and graphic visualisation* (2008) Cambridge University Press, Cambridge.

UNICEF *The State of the World's Children* (2003) UNICEF, New York.

UNICEF, *The state of the world's children in numbers: Every child counts: Revealing disparities, advancing children's rights* (2014) UNICEF, New York.

United Nations *World youth report: The global situation of youth* (2004) UN Youth Unit; New York.

United Nations Department of Public Information, *Convention on the Rights of the Child* (1991) United Nations, New York.

United Nations, *Legislative History of the Convention on the Rights of the Child* Volume 1 (2007) United Nations, New York and Geneva.

United Nations, *World youth report: The global situation of youth* (2004) UN Youth Unit (New York).

Van Bueren G (ed) *International documents on children* (1993) Martinus Nijhoff Publishers, Dordrecht.

Van Bueren G *The international law on the rights of the child* (1995) Martinus Nijhoff Publishers, Dordrecht.

Van Heerden B, Cockrell A and Keightley R (eds) *Boberg's law of persons and the family* 2 ed (1999) Juta, Kenwyn

Veerman PE *The rights of the child and the changing image of the child* (1992) Martinus Nijhoff Publishers, Dordrecht.

Verhellen E (ed) *Understanding children's rights: Collected papers presented at the international Interdisciplinary Course on Children's Rights* (2000) The Children's Rights Centre, Ghent.

Visser PJ and Potgieter JM *Introduction to family law* 2 ed (1998) Juta, Kenwyn.

Vygotsky L *Mind in society: The development of higher psychological processes* (1978) Harvard University Press, Cambridge, MA.

Weeks J *Population: An introduction to issues and concepts* 7 ed (1999) Wardsworth Publishers, Belmont, CA.

Wolff RP *In defence of anarchism* (1970) Harper and Row, New York.

Wood D *How children think and learn* 2 ed (1998) Blackwell Publishing, Oxford.

World Health Organisation, *Reproductive health strategy to accelerate progress towards the attainment of international development goals and targets* (2004) WHO, Geneva.

World Health Organisation, *The prevention and management of unsafe abortion: Report of a technical working group* (1992) WHO, Geneva.

World Health Organisation, *Unsafe abortion: Global and regional estimates of incidence of and mortality due to unsafe abortion with a listing of available country data* (1998) WHO, Geneva.

Chapters in books

Alderson P ‘Consent to surgery for deaf children: making informed decisions’ in L Komesaroff (ed) *Surgical consent: Bioethics and cochlear implantation* (2007) Gallaudet University Press, Washington, DC.

Alderson P ‘The rights of children and young people’ in A Coote (ed) *The welfare of citizens developing new social rights* (1992) IPPR/Rivers Oram Press, London.

Alston P ‘The best interests principle: Towards a reconciliation of culture and human rights’ in Alston P (ed) *The best interests of the child: Reconciling culture and human rights* (1994) Oxford University Press, Oxford.

An-Na’im A ‘Cultural transformation and normative consensus on the best interests of the child’ in Alston P (ed) *The best interests of the child: Reconciling culture and human rights* (1994) Oxford University Press, Oxford.

Bainham A ‘Growing up in Britain: Adolescence in the post-Gillick era’ in Eekelaar JM and Sarcevic P (eds): *Legal and social issues for the Twenty First Century* (1993) Martinus Nijhoff Publishers, Dordrecht.

Bainham A ‘Parentage, parenthood and parental responsibility: Subtle, elusive yet important distinctions’ in Bainham A, Sclater SD and Richards M (eds) *What is a parent? A socio-legal analysis* (1999) Hart Publishing, Oxford.

Barratt A 'The best interest of the child: Where is the child's voice?' in Burman S (ed) *The fate of the child: Legal decisions on children in the new South Africa* (2003) Juta, Lansdowne.

Barry M 'Minor rights and major wrings: The views of young people in care' in Franklin B (ed) *The new handbook of children's rights* (2001) Routledge, London and New York.

Bekink B and Brand D 'Constitutional protection of children' in CJ Davel (ed) *Introduction to child law in South Africa* (2000) Juta, Cape Town.

Bellon CM 'The promise of children's rights: Best interests and evolving capacities' in K Alaimo and B Klug (eds) *Children as equals: Exploring the rights of the child* (2002) University Press of America, Lanham, MD.

Benn SI 'Privacy, freedom and respect for persons' in Pennock JR and Chapman JW (eds) *Nomos XIII: Privacy* (1971) Atherton Press, New York.

Boezaart T 'General principles' in Davel CJ and Skelton AM (eds) *Commentary on the Children's Act* (2007) Juta, Cape Town.

Boezaart T 'Child law, the child and South African private law' in Boezaart T (ed) *Child law in South Africa* (2009) Juta, Cape Town.

Boniface A 'Revolutionary changes to the parent-child relationship in South Africa' in Sloth-Nielsen J and Du Toit Z (eds) *Trials and tribulations, trends and triumphs: Developments in international, African and South African child and family law* (2008) Juta, Cape Town.

Bonthuys E 'Children' in J Currie and De Waal (eds) *The Bill of Rights handbook* 5 ed (2005) Juta, Cape Town.

Bosman FJ and Van Zyl GJ 'Children, young persons and their parents' in JA Robinson (ed) *The law of children and young persons in South Africa* (1997) Butterworths, Durban.

Brems E 'Children's rights and universality' in Willems JCM (ed) *Developmental and autonomy rights of children: Empowering children, caregivers and communities* 2 rev ed (2007) Intersentia, Antwerp.

Bridge C 'Religion, culture and the body of the child' in Bainham A, Sclater SD and Richards M (eds) *Body lore and laws* (2002) Hart Publishing, Oxford and Portland.

Campbell TD 'Rationales for freedom of communication' in Campbell TD and Sadurski W (eds) *Freedom of Communication* (1994) Dartmouth, Aldershot.

Cantwell N 'Are children's rights still human?' in Invernizzi A and Williams J (eds) *The human rights of children: From visions to implementation* (2011) Ashgate, Farnham.

Cantwell N 'The origins, development and significance of the United Nations Convention on the Rights of the Child' in Detrick S (ed) *The United Nations Convention on the Rights of the Child: A guide to the travaux preparatoires* (1992) Martinus Nijhoff Publishers, Dordrecht, Boston and London.

Caraveo YC, Perez C and Hernandez J 'Youth participation in indigenous traditional communities' in Percy-Smith B and Thomas N (eds) *A handbook of children and young people's participation: Perspectives from theory to practice* (2010) Routledge, Abingdon.

Cass B 'The limits of the public/private dichotomy: A comment on Coady & Coady' in Alston P, Parker S and Seymour J (eds) *Children, rights and the law* (1992) Clarendon Press, Oxford.

Coady M and Coady C 'There ought to be a law against it': Reflections on child abuse, morality and law' in P Alston, S Parker and J Seymour (eds) *Children, rights and the law* (1992) Clarendon Press, Oxford.

Cockrell A 'Capacity to litigate' in Van Heerden B, Cockrell A and Keightley R (eds) *Boberg's law of persons and the family* 2 ed (1999) Juta, Kenwyn.

Cohen R 'Endless teardrops: Prolegomena to the study of human rights in Africa' in Cohen R, Hyden G and Nagan WP (eds) *Human rights and governance in Africa* (1993) University Press of Florida, Gainesville, Tallahassee and Tampa.

Cohen CP 'The relevance of theories of natural law and legal positivism' in Freeman M and Veerman P (eds) *Ideologies of children's rights* (1992) Martinus Nijhoff Publishers, Dordrecht.

Davel C 'The child's right to legal representation in divorce proceedings' in Nagel C (ed) *Gedenkbundel vir JMT Lubaschagne* (2006) Lexis Nexis Butterworths, Durban.

Davel T 'General principles' in Davel CJ and Skelton A (ed) *Commentary on the Children's Act* (2007) Juta, Cape Town.

Davidson H 'The child's right to be heard and represented' in Cohen CP and Davidson H (eds) *Children's rights in America: UN Convention on the Rights of the Child compared with United States law* (1990) American Bar Association, Chicago, Illinois.

De Jong M 'Child-focused mediation' in T Boezaart (ed) *Child law in South Africa* (2009) Juta, Cape Town.

Delplace M 'Participation rights of children' in Ang F, Berghmans E, Cattrijsse L and Delplace M (eds) *Participation rights of children* (2006) Intersentia, Antwerpen and Oxford..

Dodson GD 'Legal rights of adolescents: Restrictions on liberty, emancipation, and status offences' in Horowitz RM and Davidson HA (eds) *Legal rights of children* (1984) Shepherd's/McGraw-Hill, Colorado Springs.

Duncan W 'Children's rights, cultural diversity and private international law' in Douglas G and Sebba L (eds) *Children's rights and traditional values* (1998) Dartmouth, Aldershot and Ashgate.

Du Toit C 'Legal representation of children' in Boezaart T (ed) *Child law in South Africa* (2009) Juta, Cape Town.

Dworkin G 'Consent, representation and proxy consent' in Gaylin W and Macklin R (eds) *Who speaks for the child: The problems of proxy consent* (1982) Plenum Press, New York.

Dworkin G 'Paternalism' in Wasserstrom RA (ed) *Morality and the law* (1971) Wardsworth, Belmont, CA.

Edwards L 'Hearing the voice of the child: Notes from the Scottish experience' in Davel CJ (ed) *Children's rights in a transitional society* (1999) Juta, Lansdowne.

Eekelaar J 'Families and children: From welfarism to rights' in McCrudden C and Chambers G (eds) *Individual rights and law in Britain* (1994) Clarendon Press, Oxford.

Eekelaar J 'Personal rights and human rights' in Lødrup P and Modvar E (eds) *Family Life and human rights* (2004) Glydendal-Akedemisk, Oslo.

Eekelaar J 'The best interests of the child and the child's wishes: The role of dynamic self-determinism' in Alston P (ed) *The best interests of the child: Reconciling culture and human rights* (1993) Oxford University Press, Oxford.

J Ennew 'Time for children or time for adults?' in Qvortrup J, Bardy M, Sgritta G and Wintersberger H (eds) *Childhood matters: Social theory, practice and politics* Vol 14 (1994) Avebury, Aldershot.

English J 'What do grown children owe their parents?' in O'Neill O and Ruddick W (eds) *Having Children: Philosophical and Legal Reflections on Parenthood* (1979) Oxford University Press, New York.

Falk ZW 'Rights and autonomy – or the best interest of the child?' in Douglas G and Sebba L (eds) *Children's rights and traditional values* (1998) Dartmouth, Aldershot and Ashgate.

Fedler J 'Life' in Chaskalson M, Kentridge J, Klaaren J, Marcus G, Spitz D and Woolman S (eds) *Constitutional law of South Africa* 1 ed, RS 2, (1998) Juta Cape Town.

Feinberg J 'The child's right to an open future' in Aiken W and LaFollette H (eds) *Whose child? Children's rights, parental authority and state power* (1980) Rowman and Littlefield, Totowa, NJ.

Feld BC 'The right to counsel in the juvenile court: An empirical study of when lawyers appear and the difference they make' in Feld BC (ed) *Readings in juvenile justice administration* (1999) Oxford University Press, New York.

Fernyhough T 'Human rights and pre-colonial Africa' in An-Na'im AA and Deng FM (eds) *Human rights in Africa: Cross-cultural perspectives* (1990) The Brookings Institute, Washington.

Fineman ML 'The politics of custody and gender: Child advocacy and the transformation of custody decision-making in the USA' in Smart C and Sevenhuijsen S (eds) *Child custody and the politics of gender* (1989) Routledge, London and New York.

Flisher AJ and Gevers A 'Mental health and risk behaviour' in M Kibel, L Lake, P Pendlebury and C Smith (eds) *South African Child Gauge* (2010) University of Cape Town Children's Institute, Cape Town.

Franklin B 'The case for children's rights: A progress report' in Franklin B (ed) *The handbook of children's rights: Comparative policy and practice* (1995) Routledge, London and New York.

Fredman S 'The age of equality' in Fredman S and Spencer S (eds) *Age as an equality issue: Legal and policy perspectives* (2003) Hart Publishing, Oxford.

Freeman M 'Child abuse: The search for a solution' in Freeman M (ed) *Overcoming child abuse: A window on a world problem* (2000) Ashgate, Aldershot.

Freeman M 'Children at the edge of life: Parents, doctors and children's rights' in Rioux MH, Bassar LA and Jones M (eds) *Critical perspectives on human rights and disability law* (2010) Martinus Nijhoff Publishers, Leiden and Boston.

Freeman M 'Do children have the right not to be born?' in Freeman M (ed) *The moral status of children: Essays on the rights of the child* (1997) Martinus Nijhoff Publishers, The Hague, London and Boston.

Freeman M 'Feminism and child law' in Bridgeman J and Monk D (eds) *Feminist perspectives on child law* (2000) Cavendish Publishing, London and Sydney.

Freeman M 'Introduction: Children as persons' in Freeman M (ed) *Children's rights: A comparative perspective* (1995) Dartmouth, Aldershot.

Freeman M 'Removing rights from adolescents' in Ronen Y and Greenbaum CW (eds) *The case for the child: Towards a new agenda* (2008) Intersentia, Antwerpen.

Freeman M 'Taking children's rights more seriously' in Alston P, Parker S and Seymour J (eds) *Children, rights and the law* (1995) Clarendon Press, Oxford.

Freeman M 'The best interests of the child' in Alen A, Vande Lanotte J, Verhellen E, Ang F, Berghmans E, Verheyde M and Abramson B (eds) *Commentary on the United Nations Convention on the Rights of the Child* (2007) Martinus Nijhoff Publishers, Leiden.

Frey RG 'Privacy, control and talk of rights' in Paul EF, Miller FD and Paul D (eds) *The right to privacy* (2000) Cambridge University Press, Cambridge.

Friedman A, Pantazis A and Skelton A 'Children's rights' in Woolman S, Roux T, Klaaren J, Stein A and Chaskalson M (eds) *Constitutional law of South Africa* 2 ed RS 4 (2012) Juta, Cape Town.

Frones I 'Dimensions of childhood' Qvortrup J, Bardy M, Sgritta G and Wintersberger H (eds) *Childhood matters: Social theory, practice and politics* Vol 14 (1994) Palgrave Macmillan, Basingstoke and New York.

Glasser N 'Custody on divorce: Assessing the role of the family advocates' in Burman S (ed) *The fate of the child: Legal decisions on children in the new South Africa* (2003) Juta, Cape Town.

Gluckman M 'Kinship among the Lozi of Northern Rhodesia and the Zulu of Natal' in Radcliffe-Brown AR and Forde P (eds) *African systems of kinship and marriage* (1962) Oxford University Press, London.

Gluckman M 'Property rights and status in African traditional law' in Gluckman M (ed) *Ideas and procedures in African customary law* (1996) Oxford University Press, Oxford.

Grisso T 'What we know about youth's capacities' in Grisso T and Schwartz RG (eds) *Youth on trial: A developmental perspective on juvenile justice* (2000) Chicago University Press, Chicago.

Hammarberg T 'A Convention for the future' in Barnen R (ed) *Making Reality of Children's Rights, Final Report of the International Conference on the Rights of the Child* (1989) Save the Children, Stockholm, Sweden.

Hammarberg T 'The rights of the child and the industrialised countries' in Ekberg K and Mjaavatn PE (eds) *Children at risk: Selected papers* (1993) Norwegian Centre for Child Research, Trondheim.

Harris J 'The political status of children' in Graham K (ed) *Contemporary political philosophy: Radical studies* (1982) Cambridge University Press, Cambridge.

Hart HLA 'Are there any natural rights?' in Melden AI (ed) *Human rights* (1970) Wadsworth, Belmont, CA.

Hart HLA 'Bentham on legal rights' in AWB Simpson (ed) *Oxford essays in jurisprudence* (1973) Clarendon Press, Oxford.

Hart HLA 'Legal rights' in HLA Hart (ed) *Essays on Bentham: Studies in jurisprudence and political theory* (1982) Oxford, Oxford University Press.

Hart R 'The evolving capacities for children to participate' in Johnson V, Ivan-Smith E, Gordon G, Pridmore P and Scott P (eds) *Stepping forward: Children and young people's participation in the development process* (1998) IT Publications, London.

Heaton J 'Capacity to perform juristic acts: Marriage and other acts' in Van Heerden B, Cockrell A and Keightley R (eds) *Boberg's law of persons and the family* 2 ed (1999) Juta, Kenwyn.

Heaton J 'Parental responsibilities and rights' in Davel CJ and Skelton A (eds) *Commentary on the Children's Act* (2007) Juta, Cape Town.

Held D 'Between State and civil society' in Andrews G (ed) *Citizenship* (1991) Lawrence and Wishart, London.

Herring J 'Welfare principle and the rights of parents' in Bainham A, Sclater SD and Richards M (eds) *What is a parent? A socio-legal analysis* (1999) Hart Publishers, Oxford.

Himonga C 'Children (minors)' in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) Juta, Cape Town.

Himonga C 'Unborn persons' in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) Juta, Cape Town.

Himonga C 'The right of the child to participate in decision-making: A perspective from Zambia' Ncube W (ed) *Law, culture, tradition and children's rights in Eastern and Southern Africa* (1998) Ashgate, Aldershot and Brookfield.

Holmberg B and Himes J 'Parental rights and responsibilities' in Petren A and Himes J (eds) *Children's rights: Turning principles into practice* (2000) Radda Barnen/UNICEF, Stockholm.

Howard R 'Group versus individual identity in the African debate on human rights' in An-Na'im AA and Deng FM (eds) *Human rights in Africa: Cross-cultural perspectives* (1990) The Brookings Institute, Washington.

Human S 'The theory of children's rights' in T Boezaart *Child law in South Africa* (2009) Juta, Cape Town.

Hyden G 'The challenges of domesticating rights in Africa' in Cohen R, Hyden G and Nagan WP (eds) *Human rights and governance in Africa* (1993) University Press of Florida, Gainesville, Tallahassee and Tampa.

Jaffe FD 'Competence? Now really' in Verhellen E (ed) *Understanding children's rights: Collected papers presented at the international Interdisciplinary Course on Children's Rights* (2000) Children's Rights Centre, Ghent.

James A 'Responsibility, children and childhood' in J Bridgeman, J Keating and C Lind (eds) *Responsibility, law and the family* (2008) Ashgate, Aldershot.

Jamieson L, Bray R, Viviers A, Lake L, Pendlebury S and Smith C (eds) *South African Child Gauge* (2010-2011).

Kant I 'Rights of the family as a domestic society: Title second, parental right (parent and child)' in Hastie W (trans) *The philosophy of law: An exposition of the fundamental principles of jurisprudence as the science of right* (1887) Clark, Edinburgh.

Kassan D 'Children's right to legal representation in divorce proceedings' in Sloth-Nielsen J and Du Toit Z (eds) *Trials and tribulations, trends and triumphs: Developments in international, African and South African child and family law* (2008) Juta, Cape Town.

Kassan D and Mahery P 'Special child protective measures in the Children's Act' in Boezaart T (ed) *Child law in South Africa* (2009) Juta, Cape Town.

Keightley R 'The beginning of legal personality: Birth and death' in Van Heerden B, Cockrell A, Keightley R (eds) *Boberg's law of persons and the family* 2 ed (1999) Juta, Kenwyn.

Kindermann T and Skinner EA 'Developmental tasks as organisers of children's ecologies: Mothers' contingencies as children learn to walk, eat and dress' in J Valsiner (ed) *Child development within culturally structured environments*, Vol 2 (1988).

Kindermann T and Valsiner J 'Research strategies in culture-inclusive developmental psychology' in Valsiner J (ed) *Child development in cultural context* (1989) Hogrefe and Huber, Toronto.

King P 'Thomas Hobbes' children' in Turner SM and Matthews GB (eds) *The philosopher's child: Critical perspectives* (1998) University of Rochester Press, Rochester, NY.

Kovarik J 'The space and time of children at the interface of psychology and sociology' in Qvortrup J, Bardy M, Sgritta G and Wintersberger H (eds) *Childhood matters: Social theory, practice and politics* Vol 14 (1994) Palgrave Macmillan, Basingstoke and New York.

Kuper H 'Kinship among the Swazi' in Radcliffe-Brown AR and Forde P (eds) *African systems of kinship and marriage* (1962) Oxford University Press, London.

Lansdown G 'The realisation of children's participation rights: Critical reflections' in Percy-Smith B and Thomas N (eds) *A handbook of children and young people's participation: Perspectives from theory to practice* (2010) Routledge, Abingdon.

Leonard D 'Persons in their own right': Children and sociology in the UK' in Chisholm L, Buchner P, Kruger HH and Brown P (eds) *Childhood, youth and social change: A comparative perspective* (1990) Falmer, London.

Lim H and Roche J 'Feminism and children's rights' in J Bridgeman and D Monk (eds) *Feminist perspectives on child law* (2000) Cavendish Press, London.

Lyon C and Parton N 'Children's rights and the Children Act 1989' in Franklin B (ed) *The handbook of children's rights: Comparative policy and practice* (1995) Routledge, London and New York.

MacDonald M 'Natural rights' in Waldron J (ed) *Theories of rights* (1984) Oxford University Press, Oxford.

Mahery P 'Consent laws influencing children's access to health care services' in Ijumba P and Padarath A (eds) *South African health review* (2006) Health Systems Trust, Durban.

Mahery P 'The United Nations Convention on the Rights of the Child: Maintaining its value in international and South African child law' in Boezaart T (ed) *Child law in South African law* (2009) Juta, Cape Town.

Maithufi IP 'Children, young persons and school law' in Robinson JA (ed) *The law of children and young persons in South Africa* (1997) Butterworths, Durban.

Morse SJ 'Family law in transition: From traditional families to individual liberty' in Tufte V and Myerhoff B (eds) *Changing images of the family* (1979) Yale University Press, New Haven.

Mortier F 'Rationality and competence to decide in children' in Verhellen E (ed) *Understanding children's rights: Collected papers presented at the international Interdisciplinary Course on Children's Rights* (2000) The Children's Rights Centre, Ghent.

Ncube W 'Re-evaluating law, tradition, custody and access to non-marital children in Zimbabwe' in Ncube W (ed) *Law, culture, tradition and children's rights in Eastern and Southern Africa* (1998) Ashgate, Aldershot and Brookfield.

Ncube W 'The African cultural fingerprint? The changing concept of childhood' in Ncube W (ed) *Law, culture, tradition and children's rights in Eastern and Southern Africa* (1998) Ashgate, Aldershot and Brookfield.

Ollendorff R 'The rights of adolescents' in Adams P (ed) *Children's rights: Toward the liberation of the child* (1971) Praeger, New York.

O'Sullivan M 'Reproductive rights' in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M and Bishop M (eds) *Constitutional law of South Africa* 2 ed (2005) Juta, Cape Town.

Pais MS 'The Convention on the Rights of the Child' in *Manual of human rights reporting under six major international human rights treaties* (1997) United Nations, Geneva.

Partsch KJ 'Freedom of conscience and expression, and political freedoms' in Henkin L (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) Praeger, New York.

Pieterse M 'Life' in Woolman S, Bishop M and Brickhill J (eds) *Constitutional law of South Africa* Vol 3 (2005) Juta, Cape Town.

Ovortrup J 'Childhood matters: An introduction' in Qvortrup J, Bardy M, Sgritta G and Wintersberger H (eds) *Childhood matters: Social theory, practice and politics* Vol 14 (1994) Avebury, Aldershot.

Ramcharan PG 'The concepts and dimensions of the right to life' in BG Ramcharan (ed) *The right to life in international law* (1985) Martinus Nijhoff Publishers, Dordrecht.

Rehof LA 'Article 12' in Eide A, Alfredsson G, Melander G, Rehof LA and Rosas A (eds) *The Universal Declaration of Human Rights: A commentary* (1992) Scandinavian University Press, Oslo and Oxford University Press, Oxford.

Robinson JA "'What we have got here is a failure to communicate": The cultural context of meaning' in Valsiner J (ed) *Child development within culturally structured environments*, Vol 2 (1988) Norwood, New Jersey.

Ronen Y 'Protection for whom and for what? Protection proceedings and the voice of the child at risk' in Douglas G and Sebba L (eds) *Children's rights and traditional values* (1998) Dartmouth, Aldershot.

Rwezaura B 'The duty to hear the child: A view from Tanzania' Ncube W (ed) *Law, culture, tradition and children's rights in Eastern and Southern Africa* (1998) Ashgate, Aldershot and Brookfield.

Sandberg K 'Best interests and justice' in Smart C and Sevenhuijsen S (eds) *Child custody and the politics of gender* (1989) Routledge, London and New York.

Schiifer ID and Schafer L 'Children, young persons and the Child Care Act' in Robinson JA (ed) *The law of children and young persons in South Africa* (1997) Lexis-Nexis Butterworths, Durban.

Shepherd RE 'Civil rights of the child' in Cohen CP and Davidson HA (eds) *Children's rights in America: UN Convention on the Rights of the Child compared with United States law* (1990) American Bar Association, Chicago, IL.

Sinclair J 'Family Rights' in Van Wyk D, Dugard J, De Villiers B and Davis D (eds) *Rights and constitutionalism: The new South African legal order* (1994) Juta, Kenwyn.

Sinclair J 'From parents' rights to children's rights' in Davel CJ (ed) *Children's rights in a transitional society* (1999) Protea Books, Pretoria.

Skelton A 'Children' in I Currie and J De Waal (eds) *The Bill of Rights Handbook* 6 ed (2013) Juta, Cape Town.

Skelton A 'Constitutional protection of children's rights' in T Boezaart (ed) *Child law in South Africa* (2009) Juta, Cape Town.

Skelton A 'Parental responsibilities and rights' in Boezaart T (ed) *Child law in South Africa* (2009) Juta, Cape Town.

Sloth-Nielsen J 'Children' in Cheadle H, Davis D and Haysom N (eds) *South African constitutional law: The Bill of Rights* (2002) Butterworths, Durban.

Sloth-Nielsen J and Van Heerden B 'Signposts on the Road to Equality: Towards the New Millennium for Parents, Children and Families in South Africa' in Eekelaar J and Nhlapo T (eds) *The changing family: International Perspectives on the Family and Family Law* (1998) Hart Publishing Co, Oxford.

Smith AB 'Rethinking childhood: The inclusion of children's voice' in Ronen Y and Greenbaum CW (eds) *The case for the child: Towards a new agenda* (2009) Intersentia, Antwerpen.

Smith AB and Bjerke H 'Children's citizenship' in Taylor NJ and Smith AB (eds) *Children as citizens? International voices* (2009) University of Otago Press, Dunedin.

Solberg A 'Negotiating childhood: Changing constructions of age for Norwegian children' in Qvortrup J, Bardy M, Sgritta G and Wintersberger H (eds) *Childhood matters: Social theory, practice and politics* Vol 14 (1994) Avebury, Aldershot 126.

Spiro E *The law of Parent and child* (1971) Juta, Cape Town.

Tapp J and Melton G 'Preparing children for decision-making: Implications of the legal socialisation research' in Melton G, Koocher GP and Saks ML (eds) *Children's competence to consent* (1983) Plenum, New York.

Thery I 'The interest of the child and the regulation of the post-divorce family' in C Smart and S Sevenhuijsen (eds) *Child custody and the politics of gender* (1989) Routledge, London and New York.

Thorgeirsdottir H 'Article 13: Freedom of Expression' in Alen A, Vande Lanotte J, Verhellen E, Ang F, Berghmans E and Verheyde M (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (2006) Martinus Nijhoff Publishers, Leiden.

Toope S 'The Convention on the Rights of the Child: Implications for Canada' in M Freeman (ed) *Children's rights: A comparative perspective* (1996) Dartmouth, Aldershot.

Valsiner J 'Organisation of children's social development in polygamic families' in Valsiner J (ed) *Child development in cultural context* (1989) Hogrefe and Huber, Toronto.

Van Bueren G 'Children's rights: Balancing traditional values and cultural plurality' in Douglas G and Sebba L (eds) *Children's rights and traditional values* (1998) Dartmouth, Aldershot.

Van Bueren G 'The United Nations Convention on the Rights of the Child: An evolutionary revolution' in Davel CJ (ed) *Introduction to child law in South Africa* (2000) Juta, Cape Town.

Van der Vyver JD 'Constitutional of children and young persons' in JA Robinson (ed) *The law of children and young persons in South Africa* (1997) Butterworths, Durban.

Van Heerden B 'How the parental power is acquired and lost' in Van Heerden B, Cockrell A and Keightley R (eds) *Borberg's law of persons and the family* 2 ed (1999) Juta, Kenwyn.

Van Heerden B 'Personal and proprietary aspects of the parental power' in Van Heerden B, Cockrell A and Keightley R (eds) *Borberg's law of persons and the family* 2 ed (1999) Juta, Kenwyn.

Veerman PE 'The international consensus' in Veerman PE (ed) *Rights of the child and the changing image of childhood* (1992) Martinus Nijhoff Publishers, Dordrecht.

Visser PJ and Potgieter MJ *Introduction to family law* 2 ed (1998) Juta, Cape Town.

Viviers A, Clacherty G and Maker A 'Children's experiences of participation' in Jamieson L, Bray R, Viviers A, Lake L, Pendlebury S and Smith C (eds) *South African Child Gauge* (2010-2011) University of Cape Town Children's Institute, Cape Town.

Volio F 'Legal personality, privacy and the family' in Henkin L (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) Columbia University Press, New York.

Wartofsky M 'The child's construction of the world and the world's construction of the child: From historical epistemology to historical psychology' in Kessel FS and Siegel AW (eds) *The child and other cultural inventions* (1981) Praeger, New York.

Wilson-Oyelaran EB 'Towards contextual sensitivity in developmental psychology: A Nigerian perspective' in Valsiner J (ed) *Child development in cultural context* (1989) Hogrefe and Huber, Toronto.

Wood A 'Humanity as an end in itself' in Guyer P (ed) *Critical essays on Kant's Groundwork of the Metaphysics of Morals* (1999) Lanham, MD, Rowman and Littlefield.

Woodhead W 'Children's rights and children's development: Rethinking the paradigm' in E Verhellen (ed) *Understanding children's rights: Collected papers presented at the Fifth Interdisciplinary Course on Children's Rights* (2000) The Children's Rights Centre, Ghent.

Woolman S 'Dignity' Woolman S, Roux T, Klaaren J, Stein A and Chaskalson M (eds) *Constitutional law of South Africa* 2 ed RS 4 (2012) Juta, Cape Town.

Zaal N 'Hearing the voices of children in court: A field study and evaluation' in S Burman (ed) *The fate of the child: Legal decisions on children in the New South Africa* (2003) Juta, Cape Town.

Journal Articles

Albertyn C and Goldblatt B 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14(2) *South African Journal on Human Rights* 248.

Alston P 'The best interests of the child: Towards a reconciliation of culture and human rights' (1994) 8(1) *International Journal of Law and the Family* 1.

Alston P 'The legal framework on the Convention on the Rights of the Child' (1992) 91/2 *United Nations Bulletin on Human Rights: The rights of the child* 1.

American Academy of Paediatrics Committee on Bioethics, 'Informed consent, parental permission, and assent in paediatric practice' (1995) 95(2) *Paediatrics* 314.

Anderson A and Spijker A 'Considering the view of the child when determining her best interest' (2002) *Obiter* 365.

Appelbaum PS and Grisso T 'Assessing patients' capacities to consent to treatment' 1988 319(25) *New England Journal Medicine* 1635.

Archard D 'Free speech and the interests of children' (2004) 79(1) *Chicago-Kent Law Review* 83.

Archard D and Skivenes M 'Balancing a child's best interests and a child's views' (2009) 17(1) *International Journal of Children's Rights* 1.

Armstrong A, Chuulu M, Himonga C, Letuka P, Mokobi K, Ncube W, Nhlapo T, Rwezaura B and Vilakazi P 'Towards a Cultural Understanding of the Interplay between Children's and Women's Rights: An Eastern and Southern African Perspective' (1995) 3(3) *International Journal of Children's Rights* 333.

Arnett J 'Reckless behaviour in adolescence: A developmental perspective' (1992) 12 *Developmental Review* 339.

Aronson JD 'Neuroscience and juvenile justice' (2009) 42 *Akron Law Review* 917.

Aspinall C 'Children and parents and medical decisions' (2006) 36(6) *Hastings Center Report* 3.

Barker EL and Hamman CL 'The best interests of the child in custody controversies between natural parents: Interpretations and trends' (1978-1979) 18 *Washburn Law Journal* 482.

Barratt A 'The child's right to be heard in custody and access determinations' (2002) *Tydskrif vir die Suid-Afrikaanse Reg* 556.

Barsh RL 'The Convention on the Rights of the Child: A reassessment of the final text' (1989) 7(1) *New York Law School Journal of Human Rights* 142.

Beaton GH 'Energy in human nutrition: Perspectives and freedoms' (1982) 41 *Nutrition Review* 325.

Beck CK, Glavis G, Glover SA, Jenkins MB and Nardi RA 'The rights of children: A trust model' (1978) 46(4) *Fordham Law Review* 669.

Bekink B and Bekink M 'Defining the standard of the best interest of the child: Modern South African perspectives' (2004) 37 *De Jure* 21.

Bennett, Jr WH 'A Critique of the Emerging Convention on the Rights of the Child' (1987) 20(1) *Cornell International Law Journal* 12.

Bennett TW 'The best interests of the child in an African context' (1999) 20(1) *Obiter* 145.

Belling DW and EberL C 'Teenage Abortion in Germany: With Reference to the Legal System in the United States' (1995-1996) 12 *Journal of Contemporary Health, Law and Policy* 475.

Bernard, C Ward R and Knoppers B 'Best interests of the child exposed: A portrait of Quebec custody and protection law' (1992-1993) 11 *Canadian Journal Family Law* 57.

Birchley G 'What limits, if any, should be placed on a parent's right to consent and/or refuse to consent to medical treatment for their child?' (2010) 11(4) *Nursing Philosophy* 280.

Birnbaum J 'Contextualising choice' (1996) 12 *South African Journal on Human Rights* 485.

Boezaart T and De Bruin DW 'Section 14 of the Children's Act 38 of 2007 and the child's capacity to litigate' (2011) 44(2) *De Jure* 416.

Bok S 'Lying to children' (1978) 8(3) *Hastings Centre Report* 10.

Bonthuys E and Pieterse M 'Divorced parents and the religious instruction of their children' (2001) 118 *South African Law Journal* 216.

Brighthouse H 'How should children be heard' (2003) 45(3) *Arizona Law Review* 691.

Bryan M 'Parents as fiduciaries: A special place in equity' (1995) 3(2) *International Journal of Children's Rights* 227.

Budlender G 'Access to courts' (2004) 121 *South-African Law Journal* 339.

Burchell J 'Informed consent – Variations on a familiar theme' (1986) 5(4) *Medicine and the Law* 293.

Bush SA 'Parental notification: A state-created obstacle to a minor woman's right to privacy' (1982) 12(3) *Golden Gate University Law Review* 579.

Buss E 'Rethinking the connection between developmental science and juvenile justice' (2009) 76(1) *University of Chicago Law review* 493.

Butler MA 'Early liberal roots of feminism: John Locke and the attack on patriarchy' (1978) 72(1) *The American Political Science Review* 135.

Cantwell N 'The headscarves' affair' (1989) 6 *International Children's Rights Monitor* 15.

Carnelley M 'The right to legal representation at state expense for children in care and contact disputes – A discussion of the South African legal position with lessons from Australia' (2010) 31(3) *Obiter* 638.

Carter R 'Justifying paternalism' 7(1) *Canadian Journal of Philosophy* (1977) 133.

Chirwa D 'The horizontal application of constitutional rights in comparative perspective' (2006) 10(2) *Law, Democracy and Development* 21.

Chirwa DM 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10(2) *International Journal on Children's Rights* 157.

Chirwa D and Kaime T 'Where are the missing pieces? Constructing a mosaic of the CRC and the African Children's Charter in Malawi's law and policy' (2008) 2(1) *Malawi Law Journal* 85.

Clarke B 'From rights to responsibilities? An overview of recent developments relating to the parent/child relationship in South African common law' (2002) XXXX *Comparative International Law Journal of South Africa* 216.

Cobbah JAM 'African values and the human rights debate: An African perspective' (1987) 9(3) *Human Rights Quarterly* 309.

Cockrell A 'The South African Bill of Rights and the "duck/rabbit"' (1997) 60(4) *Modern Law Review* 513.

Coetzee S 'Pregnant minors' sexual rights: A constitutional perspective' (2012) 27 *Southern African Public Law* 487.

Cook R 'Human rights and reproductive self-determination' (1995) 44 *American University Law Review* 975.

Cohen CP 'The role of non-governmental organisations in the drafting of the Convention on the Rights of the Child' (1990) 12(1) *Human Rights Quarterly* 138.

Cohen C 'The role of the United States in the drafting of the Convention on the Rights of the Child' (2006) 20(1) *Emory International Law Review* 185.

Cohen CP 'United Nations Convention on the Rights of the Child' (1990) 44 *The Review* 36.

Cohen CP, Hart SN and Kosloske SM, 'The UN Convention on the Rights of the Child: Developing an information model to computerise the monitoring of treaty compliance' (1992) 14(2) *Human Rights Quarterly* 219.

Currie I 'The concept of privacy in the South African Constitution' (2008) 3 *Journal of South African Law* 549.

Davis PC 'Contested images of family values: The role of the state' (1994) 107 *Harvard Law Review* 1348.

Dhai A 'Informed consent' (2008) 1(1) *South African Journal of Bioethics and Law* 27.

Dickenson D and Jones D 'True wishes: The philosophy and developmental psychology of children's informed consent' (1995) 2(4) *Philosophy, Psychiatry and Psychology* 287.

Doek JE 'What does the Children's Convention require?' (2006) 20(1) *Emory International Law Review* 199.

Donnelly J and Howard R 'Assessing national human rights performance: A theoretical framework' (1988) 10(2) *Human Rights Quarterly* 214.

Doyal L and Wilsher D 'Towards guidelines for withholding and withdrawal of life prolonging treatment in neonatal medicine' (1994) 70(1) *Archives of Diseases in Childhood* 46.

Dickens BM 'The modern function and limits of parental rights' (1981) 97(4) *Law Quarterly Review* 462.

Du Plessis LM 'Jurisprudential reflections on the status of the unborn life' (1990) 1 *Tydskrif vir die Suid-Afrikaanse Reg* 44.

Durojaye E 'Access to contraception for adolescents in Africa: A human rights challenge' (2011) XLIV *Comparative International Law Journal of South Africa* 1.

Eden O 'Consent difficult in paediatric oncology' (1994) 308 *British Medical Journal* 272.

Edwards M 'New approaches to children and development' (1996) Vol 8(6) *Journal of International Development* 813, 815-16.

Eekelaar J 'The eclipse of parental rights' (1986) 102 *Law Quarterly Review* 4.

Eekelaar J 'The emergence of children's rights' (1986) 6(2) *Oxford Journal of Legal Studies* 161.

Eekelaar J 'The importance of thinking that children have rights' (1992) 6(1) *International Journal of Law and the Family* 221.

Ehlers VJ 'Adolescent mothers' non-utilisation of contraceptives in Zimbabwe' 12(2) 2010 *Africa Journal of Nursing and Midwifery* 14.

Emery RE 'Children's voices: Listening – and deciding – is an adult responsibility' (2003) 45 *Arizona Law Review* 621.

Etzioni A 'On Protecting Children from Speech Symposium: Do children have the same First Amendment Rights as adults?' (2004) 79(1) *Chicago-Kent Law Review* 3.

Etzioni A 'Response' (2004) 79(1) *Chicago-Kent Law Review* 299.

Ezer T 'A positive right to protection for children' (2004) 7 *Yale Human Rights and Development Law Journal* 1.

Federle KH 'Looking for rights in all the wrong places: Resolving custody disputes in divorce proceedings' (1994) 15 *Cardozo Law Review* 1523.

Federle KH 'On the road to reconceiving rights for children: A post-feminist analysis of the capacity principle' (1993) 42 *DePaul Law Review* 983.

Federle KH 'Rights flow downhill' (1994) 2(4) *International Journal of Children's Rights* 343.

Feinberg J 'Legal paternalism' (1971) 1(1) *Canadian Journal of Philosophy* 105.

Fineman M 'Dominant discourse, professional language and legal change in child custody decision-making' (1988) 101(4) *Harvard Law Review* 727.

Flicker LS 'Acting in the best interest of a child does not mean choosing the best child' (2012) 12(4) *American Journal of Bioethics* 29.

Fost N 'Ethical problems in paediatrics' (1976) 6(12) *Current Problems in Pediatrics* 1.

Frank D and Zeisel S 'Failure to thrive' (1988) 35(6) *Paediatric Clinics of North America* 1187.

Franklin A and Sloper P 'Listening and responding? Children's participation in health care within England' (2005) 13(1/2) *International Journal of Children's Rights* 11.

Fredman S 'Providing equality: Substantive equality and the positive duty to provide' (2005) 21(2) *South African Journal on Human Rights* 163.

Freeman M 'Is a political science of human rights possible' (2001) 19(2) *Netherlands Quarterly of Human Rights* 123.

Freeman M 'The sociology of childhood' (1998) 6(4) *International Journal of Children's Rights* 433.

Freeman M 'Whither children: Protection, participation and autonomy' (1993-1994) 22 *Manitoba Law Journal* 307.

Fred C 'Privacy' (1968) 77(3) *Yale Law Journal* 475.

Fried S 'Sexuality and human rights' (2004) 7(2) *Health and Human Rights* 273.

Gallagher M 'Foucault, power and participation' (2008) 16(3) *International Journal of Children's Rights* 395.

Gallinetti J '2kul2Btru: What children would say about the jurisprudence of Albie Sachs' (2010) 25(1) *Southern African Public Law* 108.

Galston W 'When well-being trumps liberty: Political theory, jurisprudence and children's rights' (2004) 79(1) *Chicago-Kent Law Review* 279.

Gavison R 'Feminism and the public/private Distinctions' (1992) 45(1) *Stanford Law Review* 1.

Gaylin WMD 'Who speaks for the helpless: The question of proxy consent' (1979) 18 *Journal of the American Academy of Child Psychiatry* 419.

Giesen D 'From paternalism to self-determination to shared decision-making' (1988) *Acta Juridica* 107.

Gillon R 'Refusal of potentially life-saving blood transfusions by Jehovah's Witnesses: Should doctors explain that not all JW's think it is religiously required?' (2000) 26(5) *Journal of Medical Ethics* 299.

Glasier A, Gulmezoglu AM, Schmid GP, Moreno CG and Van Look PFA 'Sexual and reproductive health: A matter of life and death' (2006) 368(9547) *Lancet* 1595.

Goldstein J 'Medical care for the child at risk: On state supervision of parental autonomy' (1977) 86(4) *Yale Law Journal* 645.

Goodin R and Gibson D 'Rights, young and old' (1997) 17(2) *Oxford Journal of Legal Studies* 185.

Grant B and Schwikkard P 'People's Courts?' (1991) 7(3) *South African Journal on Human Rights* 304.

Green AL 'Future-time perspective in adolescence: The present of things future revisited' (1986) 15 *Journal of Youth and Adolescence* 99.

Grisso T and Vierling L 'Minors' consent to treatment: A developmental perspective' (1978) 9(3) *Professional Psychology* 412.

Grisso T 'The competence of adolescents as trial defendants' (1997) 3(1) *Psychology, Public Policy and Law* 3.

Gunning IR 'Arrogant perception, world travelling and multicultural feminism: The case of female genital surgeries' (1991-1992) 23(3) *Columbia Human Rights Law Review* 189.

Gutman A 'Children, paternalism and education' 9(4) *Philosophy and Public Policy* 338.

Hafen BC 'Children's liberation and the new egalitarianism: Some reservations about abandoning youth to their rights' (1976) *Brigham Young Review* 605.

Hafen BC 'Individualism and autonomy in family law: The waning of belonging' (1991) *Brigham Young University Law Review* 1.

Hafen BC 'Exploring test cases in child advocacy' (1986) 100 *Harvard Law Review* 435.

Hafen BC and Hafen JO 'Abandoning children to their autonomy: The United Nations Convention on the Rights of the Child' (1996) 37(2) *Harvard International Law Journal* 449.

Harding S 'Can there be an anthropology of children?' (1973) 4 *Journal of the Anthropological Society of Oxford* 85.

Hammarberg T 'The UN Convention on the Rights of the Child and how to make it work' (1990) 12(1) *Human Rights Quarterly* 97.

Hart J 'Child participation and international development: Attending to the political' (2008) 16(3) *International Journal of Children's Rights* 407.

Hart SN 'From property to persons: Historical perspective on children's rights' (1991) 46(1) *American Psychologist* 53.

Haydon G 'The right to education and compulsory schooling' 9(1) *Educational Philosophy and Theory* 1.

Heaton J 'An individualised, contextualised and child-centred determination of the child's best interests, and implications of such an approach in the South African context' (2009) 34(2) *Journal of Juridical Science* 1.

Herring J 'Children's abortion rights' (1998) 5 *Medical Law Review* 257.

Herring DJ 'Exploring the political roles of the family: Justifications for permanency planning for children' (1995) 26 *Loyola University of Chicago Law Journal* 183.

Herring J 'The Human Rights Act and the welfare principle in family law – Conflicting or complementary?' (1999) 11 *Child and Family Law Quarterly* 223.

Himonga C and Cooke A 'A child's autonomy with special reference to reproductive medical decision-making in South African law: Mere illusion or real autonomy' (2007) 15(3) *International Journal of Children's Rights* 333.

Himonga C 'Implementing the rights of the child in African legal systems: The *Mthembu* journey in search of justice' (2001) 9(2) *The International Journal of Children's Rights* 89.

Hinton R 'Children's participation and good governance: Limitations on the theoretical literature' (2008) 16(3) *International Journal of Children's Rights* 285.

Hinton R, Tisdall KEM, Gallagher M and Elsley S 'Children's and young's participation in public decision-making' (2008) 16(3) *International Journal of Children's Rights* 281.

Hodson JD 'The principle of paternalism' 14(1) *American Philosophical Quarterly* (1977) 61.

Howard R 'Evaluating human rights in Africa: Some problems of implicit comparisons' (1984) 6(2) *Human Rights Quarterly* 160.

Hultqvist K 'Changing rationales for governing the child' (1997) 4 *Childhood* 405.

Husak D 'Paternalism and autonomy' (1981) 10(1) *Philosophy and Public Affairs* 27.

Johnson KM 'Juvenile competency statutes: A model for state legislation' (2006) 81(3) *Indiana Law Journal* 1067.

Jonas M 'The baby MB case: Medical decision-making in the context of uncertain infant suffering' (2007) 33(9) *Journal of Medical Ethics* 541.

Jones P 'Group rights and group oppression' (1999) 7(4) *Journal of Political Philosophy* 353.

Joseph S 'United Nations Human Rights Committee: Recent cases' (2006) 6(2) *Human Rights Law Review* 361.

Jupp M 'The UN Convention on the Rights of the Child: An opportunity for advocates' (1990) 12(1) *Human Rights Quarterly* 130.

Kamchedzera GS 'The rights of the child in Malawi: An agenda for research on the impact of the United Nations Convention in a poor country' (1991) 5(3) *International Journal of Law and the Family* 241.

Katz M 'The doctor's dilemma: Duty and risk in the treatment of Jehovah's Witnesses' (1996) 85 *South African Law Journal* 484.

King M 'Against children's rights' (1996) *Acta Juridica* 28.

King M 'South African children speak out' (1993) 1(1) *The international Journal of Children's Rights* 71.

Kisdall KEM 'Is the honeymoon over? Children and young people's participation in public decision-making' (2008) 16(3) *International Journal of Children's Rights* 419.

Kleinig J 'Mill, children and rights' (1976) 8(1) *Educational Philosophy and Theory* (1976) 1.

Kling S 'Ethical issues in treating children' (2011) 24(4) *Current Allergy and Clinical Immunology* 218.

Komrad MS 'A defence of medical paternalism: Maximising patients' autonomy' (1983) 9(1) *Journal of Medical Ethics* 38.

Kramer MW 'Refining the interest theory of rights' (2010) 55 *The American Journal of Jurisprudence* 31.

Kruger JM 'The protection of children's rights in the South African Constitution: Reflections on the first decade' (2007) 70(2) *Tydskrif vir die Suid-Afrikaanse Reg* 239.

Ksentini FZ 'The Convention on the Rights of the Child' (1992) 91(2) *Bulletin of Human Rights* 45.

Lai SY and Ralph RE 'Female sexual autonomy and human rights' (1995) 21 *Harvard Human Rights Journal* 201.

Labuschagne JMT 'Parental rights to participate in a child's personality development and its religious and moral upbringing and the child's right to freedom of choice: Observations on the field of tension caused by the irrational in a human rights dispensation' (2004) 25(1) *Obiter* 41.

Langlaude S 'On how to build a positive understanding of the child's right to freedom of expression' (200) 10(1) *Human Rights Law Review* 33.

Lansdown G and Karkara R 'Children's right to express views and have them taken seriously' (2006) 367 *Essay Focus* 690.

Lansdown G 'Implementing children's rights and health' (2000) 83(4) *Archives of Diseases in Childhood* 286.

Leo RF 'Competency and the capacity to make treatment decisions: A primer for primary care physicians' (1999) 1(5) *Prim Care Companion Journal of Clinical Psychiatry* 131.

Lewis C 'A comparison of minors' and adults' pregnancy decisions' (1980) 50(3) *American Journal of Orthopsychiatry* 446.

Lloyd A 'A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child' (2002) 2(1) *African Human Rights Law Journal* 11.

Loenen T 'The equality clause in the South African Constitution: Some remarks from a comparative perspective' (1997) 13(3) *South African Journal on Human Rights* 401.

Lowe NV 'The meaning and allocation of parental responsibility - A common lawyer's perspective' (1997) 11(2) *International Journal of Law, Policy and the Family* 192.

Lucker-Babel MF 'The right of the child to express views and to be heard: An attempt to interpret Article 12 of the UN Convention on the Rights of the Child' (1995) 3(3) *International Journal of Children's Rights* 391.

MacCormick N 'Children's rights: A test case for theories of right' (1976) 62(3) *Archiv für Rechts-und Sozialphilosophie* 305

MacLeod CM 'A liberal theory of freedom of expression for children' (2004) 79(1) *Chicago-Kent Law Review* 55.

Mayall B 'The sociology of childhood in relation to children's rights' (2000) 8 *The International Journal of Children's Rights* 243.

McGillivray A 'Children's rights, paternal power and fiduciary duty: From Roman law to the Supreme Court of Canada' (2011) 19(1) *International Journal of Children's Rights* 21.

McGoldrick D 'The United Nations Convention on the Rights of the Child' (1991) 5(2) *International Journal of Law and the Family* 132.

McNeil BJ, Pauker SG, Sox Jr, HC and Tversky A 'On the elicitation of preferences for alternative therapies' (1982) 306(21) *New England Journal of Medicine* 1259.

McQuoid-Mason D 'Parental refusal of blood transfusions for minor children solely on religious grounds — the doctor's dilemma resolved' (2005) 95(1) *South African Medical Journal* 29.

McQuoid-Mason D 'Provisions for consent by children to medical treatment and surgical operations, and duties to report child and aged persons abuse' (2010) 100(10) *South African Medical Journal* 646.

McQuoid-Mason D 'Some consent and confidentiality issues regarding the application of the Choice on Termination of Pregnancy Act to girl-children' (2010) 3(1) *South African Journal of Bioethics and Law* 12.

McQuoid-Mason D 'The effect of the new Children's Act on consent to HIV testing and access to contraceptives by children' (2007) 97(12) *South African Medical Journal* 1252.

McQuoid-Mason DJ 'The National Health Act and refusal to consent to services by children' (2006) 96(6) *South African Medical Journal* 530.

McQuoid-Mason DJ and Dada MA 'The National Health Act: Some implications for family practice' (2006) 24(1) *Continuing Medical Education* 12.

Meisel A, Roth LH and Lidz CW 'Toward a model of the legal doctrine of informed consent' 134(3) *American Journal of Psychiatry* (1977) 285.

Melton GB 'Parents and children: Legal reform to facilitate children's participation' (1999) 54(11) *American Psychologist* 935.

Meyerson D 'Abortion: The Constitutional Issues' (1999) 116(1) *South African Law Journal* 50.

Minow M 'Rights for the next generation: A feminist approach to children's rights' (1986) 9 *Harvard Women's Law Journal* 1.

Minow M and Shanley ML 'Relational rights and responsibilities: Revisioning the family in liberal political theory and law' (1996) 11(1) *Hypatia* 4.

Mnookin RH 'Child-custody adjudication: Judicial functions in the face of indeterminacy' (1975) 39(3) *Law and Contemporary Problems* 226.

Mnookin R 'Children's rights: Beyond the kiddie libbers and child savers' (1978) 7 *Journal of Clinical Child Psychology* 163.

Montague P 'The myth of parental rights' (2000) 26(1) *Social Theory and Practice* 47.

Montgomery J 'Rhetoric and reality' (1989) 9 *Oxford Journal of Legal Studies* 395.

Moses S 'Children and participation in South Africa: An overview' (2008) 16(3) *International Journal of Children's Rights* 327.

Moyo A 'Balancing the best interests of the child and the interests of society when sentencing youth offenders and primary caregivers in South Africa' (2013) 29(3) *South African Journal on Human Rights* 314.

Moyo A 'Defending human rights and the rule of law by the SADC Tribunal: *Campbell* and beyond' (2009) 9(2) *African Human Rights Law Journal* 590.

Moyo A 'Reconceptualising the paramountcy principle: Beyond the individualistic construction of the best interests of the child' (2012) 12(1) *African Human Rights Law Journal* 142.

Moyo A 'Youth, competence and punishment: Reflections on South Africa's minimum sentencing regime for juvenile offenders' (2011) 26(1) *Southern African Public Law* 229.

Muramoto O 'Bioethics of the refusal of blood by Jehovah's Witnesses: Part 3, A proposal for a don't ask don't tell policy' (1999) 25(6) *Journal of Medical Ethics* 463.

Munir ABB 'Child protection: Principles and applications' (1993) 2(2) *Child Abuse Review* 119.

Mutyaba R 'Early marriage: A violation of girls' fundamental rights in Africa' (2011) 19(2) *International Journal of Children's Rights* 339.

Naude T 'The value of life: A note on *Christian Lawyers Association of SA v Minister of Health*' (1999) 15(4) *South African Journal on Human Rights* 541.

Neethling J 'The protection of the right to privacy against fixation of private facts' (2004) 121 *The South African Law Journal* 519.

Neff C 'Woman, womb and bodily integrity' (1991) 3 *Yale Journal of Law and Feminism* 327.

Ngwenya C 'An appraisal of abortion laws in Southern Africa from a reproductive health rights perspective' (2004) 32(4) *Journal of Law Medicine and Ethics* 708.

Ngwena C 'Health care decision-making and the competent minor: The limits of self-determination' (1996) *Acta Juridica* 132.

Ngwena C 'Inscribing abortion as a human right: Significance of the Protocol on the Rights of Women in Africa' (2010) 32(4) *Human Rights Quarterly* 783.

Ngwena C 'The history and transformation of abortion law in South Africa' 30(3) *Acta Academica* 32.

Nickel JW 'Rethinking indivisibility: Towards a theory of supporting relations between human rights (2008) 30 *Human Rights Quarterly* 948.

Nhlapo T 'Cultural diversity, human rights and the family in contemporary Africa: Lessons from the South Africa constitutional debate' (1995) 9 *International Journal of Law, Policy and Family* 208.

Nhlapo TN 'Culture and women abuse: Some South African starting points' (1992) 13 *Agenda* 5.

Nurmi JE 'How do adolescents see their future? A review of the development of future orientation and planning' (1991) 11 *Developmental Review* 1.

Ochaita E and Espinosa MA 'Children's participation in family and school life: A psychological and developmental approach' (1997) 5(3) *International Journal of Children's rights* 279.

Olivier PJJ 'Minority and the parental power' (1983) *Acta Juridica* 97.

Olsen F 'Children's Rights: Some feminist approaches to the United Nations Convention on the Rights of the Child' 6(1) *International Journal of Law and Family* 192.

Parker S 'The best interests of the child: Principles and problems' (1994) 8(1) *International Journal of Law and Family* 26.

Parkinson P 'The child participation principle in child protection law in New South Wales' (2001) 9(3) *The International Journal of Children's Rights* 259.

Pearce J 'Consent to treatment during childhood: The assessment of competence and avoidance of conflict' (1994) 165(6) *British Journal of Psychiatry* 713.

Pickles C 'Termination-of-pregnancy rights and foetal interests in continued existence in South Africa: The Termination of Pregnancy Act 92 of 1996' (2012) 15(5) *Potchefstroom Electronic Law Journal* 403.

Pieterse M 'In *loco parentis*: Third party parenting rights in South Africa' (2000) 11 *Stellenbosch Law Review* 324.

Polier JS 'Problems involving family and child' (1966) 66 *Columbia Law Review* 305.

Pollis A 'Towards a new universalism: Reconstruction and dialogue' (1998) 16(1) *Netherlands Quarterly of Human Rights* 5.

Pound R 'Individual interests in the domestic relations' (1916) 14 *Michigan Law Review* 177.

Quinot G 'The right to die in American and South African constitutional law' (2004) XXXVII *Comparative International Law Journal of South Africa* 139.

Rampal A 'Scaffolded participation of children: Perspectives from India' (2008) 16(3) *International Journal of Children's Rights* 313.

Rautenbach IM 'The conduct and interests protected by the right to privacy in section 14 of the constitution' 2001 *Journal of South African Law* 115.

Rebouché R 'Parental involvement laws and new governance' (2011) 34 *Harvard Journal of Law and Gender* 175.

Reilly P 'Communicating with patients: Improving communication, satisfaction and compliance' (1989) 39 (322) *The Journal of the Royal College of General Practitioners* 177.

Robert L 'The rights of parents' (1976) *Brigham Young Law Review* 693.

Roche J 'Children: Rights, participation and citizenship' (1999) 6(4) *Childhood* 475.

Rodham H 'Children under the law' (1973) 43(4) *Harvard Educational Review* 487.

Roederer C 'Post-matrix legal reasoning: Horizontality and the rule of values in South African law' (2003) 19(1) *South African Journal on Human Rights* 57.

Rogers CM and Wrightsman LS 'Attitudes toward children's rights: Nurturance or self-determination?' (1978) 34(2) *Journal of Social Issues* 59.

Rogoff B, Sellers MJ, Pirotta S, Fox N and White SH 'Age of assignment of roles and responsibilities in children: A cross cultural study' (1975) 18 *Human Development* 353.

Raz J 'Legal rights' (1984) 4(1) *Oxford Journal of Legal Studies* 1

Rue JL 'The distribution of contraceptives to unemancipated minors: Does a parent have a constitutional right to be notified' (1980-81) 69(2) *Kentucky Law Journal* 436.

Ruiz-Gimenez J 'The human rights of the child' (1993) 50 *The Review* 82.

Rwezaura BA 'The concept of the child's best interests in the changing economic and social context of Sub-Saharan Africa' (1994) 8 *International Journal of Law and the Family* 82.

Rwezaura BA 'Changing community obligations to the elderly in contemporary Africa' 4(1) *Journal of Social Development in Africa* (1989) 5.

Rwezaura BA 'The legal and cultural context of children's rights in Hong Kong' (1994) 24(2) *Hong Kong Law Journal* 276.

Rwezaura B, Armstrong A, Ncube W, Stewart J, Letuka P, Musanya P, Casimiro I and Mamashela M 'Parting the long grass: Revealing and reconceptualising the African family' (1995) 35 *Journal of Legal Pluralism* 25.

Sarkin-Hughes J 'A perspective on abortion legislation in South Africa's Bill of Rights era' (1993) 51(1) *Tydskrif vir Hedendaagse Romeins Hollandse Reg* 83.

Scarre F 'Children and paternalism' (1990) 55 *Philosophy* 117.

Scheiwe K 'Between autonomy and dependency: Minors' rights to decide on matters of sexuality, reproduction, marriage and parenthood: Problems and the state of debate – An introduction' (2004) 18(3) *International Journal of Law, Policy and the Family* 262.

Sclatter O 'Human dignity as a normative concept' (1983) 77(4) *American Journal of International Law* 848.

Scott ES and Grisso T 'Developmental incompetence, due process and juvenile justice policy' (2004-2005) 83 *North Carolina Law Review* 793.

Scott E and Grisso T 'The evolution of adolescence: A developmental perspective on juvenile justice reform' (1998) 88(1) *The Journal of Criminal Law and Criminology* 137.

Scott ES, Reppucci NB and Woolard JL 'Evaluating adolescent decision-making in legal contexts' (1995) 19(3) *Law and Human Behaviour* 221.

Schoeman F 'Parental discretion and children's rights: Background and implications for medical decision-making' (1985) 10(1) *Journal of Medicine and Philosophy* 45.

Shah I and Åhman E 'Age patterns of unsafe abortion in developing country regions' (2004) 12(24) *Reproductive Health Matters* 9.

Shmueli B and Blecher-Prigat A 'Privacy for children' (2011) 42(3) *Columbia Human Rights Law Review* 759.

Skelton A 'Severing the umbilical cord: A subtle jurisprudential shift regarding children and their primary caregivers' (2008) 1 *Constitutional Court Review* 351.

Sloth-Nielsen J 'Chicken soup or chainsaws: Some implications of the constitutionalisation of children's rights in South Africa' (1996) *Acta Juridica* 6.

Sloth-Nielsen J 'Children's rights in the South African Courts: An overview since ratification of the UN Convention on the Rights of the Child' (2002) 10(2) *The International Journal of Children's Rights* 137.

Sloth-Nielsen J 'Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law' (1995) 11 *South African Journal on Human Rights* 401.

Sloth-Nielsen J 'The contribution of children's rights to the reconstruction of society: Some implications of the constitutionalisation of children's rights in South Africa' (1996) 4(4) *The International Journal of Children's Rights* 323.

Sloth-Nielsen J and Mezmur BD '2 + 2 = 5? Exploring the domestication of the CRC in South African jurisprudence (2002-2006)' (2008) 16(1) *The International Journal of Children's Rights* 1.

Sloth-Nielsen J and Mezmur BD 'A dutiful child: The implications of article 31 of the African Children's Charter' (2008) 52(2) *Journal of African Law* 159.

Sloth-Nielsen J and Mezmur BD 'Surveying the research landscape to promote children's rights in an African context' (2007) 7(2) *African Human Rights Law Journal* 330.

Sloth-Nielsen J and Van Heerden B 'Proposed amendments to the Child Care Act and Regulations in the context of constitutional law and international law developments in South Africa' (1996) 12 *South African Journal on Human Rights* 264.

Sloth-Nielsen J and Van Heerden B 'The constitutional family: Developments in South African family law jurisprudence under the 1996 Constitution' (2003) 17(2) *International Journal of Law, Policy and the Family* 121.

Smith C 'Children's rights: Judicial ambivalence and social resistance' (1997) 11(1) *International Journal of law and the Family* 103.

Sneiderman B and McQuoid-Mason D 'Decision-making at the end of life: The termination of life-prolonging treatment, euthanasia (mercy-killing), and assisted suicide in Canada and South Africa' (2000) XXXIII *Comparative Internal Law Journal of South Africa* 193.

Sowell ER, Thompson PM, Holmes CJ, Jernigan TL and Toga AW 'In vivo evidence for post-adolescent brain maturation in frontal and striatal regions' (1999) 2(10) *Nature Neuroscience* 859.

Sowell ER, Thompson PM, Tessner KD, and Toga AW 'Mapping continued brain growth and gray matter density reduction in dorsal frontal cortex: Inverse relationships during post-adolescent brain maturation' (2001) 21(22) *The Journal of neuroscience* 8819.

Steinberg L and Cauffman E 'Maturity of judgment in adolescence: Psychosocial factors in adolescent decision making' (1996) 20(3) *Law and Human Behaviour* 249.

Stewart L 'Resource constraints and a child's right to legal representation in civil matters at state expense in South Africa' (2011) 19 *International Journal on Children's Rights* 295.

Swartz AH 'Children's competence of research hospitalisation' (1972) 287 *New England Journal of Medicine* 589.

Taylor B 'Parental autonomy and consent to treatment' (1999) 29(3) *Journal of Advanced Nursing* 570.

Taylor M and Percy-Smith B 'Children's participation: Learning from and for community development' (2008) 16(3) *International Journal of Children's Rights* 379.

Taylor N, Tapp P and Henaghan M 'Respecting children's participation in family law proceeding' (2007) 15(1) *The International Journal of Children's Rights* 61.

Thomas N and O'Kane C 'When children's wishes and feelings clash with their best interests' (1998) 6(2) *International Journal of Children's Rights* 137.

Thompson B 'Africa's Charter on children's rights: A normative break with cultural traditionalism' (1992) 41(2) *International and Comparative Law Quarterly* 432.

Tobin J 'The international obligation to abolish traditional practices harmful to children's health: What does it mean and require of States?' (2009) 9(3) *Human Rights Law Review* 373.

Twum-Danso A 'Reciprocity, respect and responsibility: The 3Rs underlying parent child-child relationships in Ghana and the implications for children's rights' (2009) 17(3) *The International Journal of Children's Rights* 415.

Udi MB 'Children's participation in Brazil – A brief genealogy and recent innovations' (2008) 16(3) *International Journal on children's rights* 301.

Van Bogaert KD 'Ethics and medicine: Jehovah's Witness and the new blood transfusion rules' (2013) 55(1) *South African Family Practice* 6.

Van Bogaert KD 'Ethics and medicine: Revisiting the Children's Act and the implications for health care practitioners' (2013) 55(1) *South African Family Practice* 2.

Van Bueren G 'A new children's treaty' (1991) 8 *International Children's Rights Monitor* 20.

Van Bueren G 'The international protection of family members' rights as the 21st Century approaches' (1995) 17(4) *Human Rights Quarterly* 732.

Van der Bank CM 'The right to privacy – South African and comparative perspectives' (2012) 1(6) *European Journal of Business and Social Sciences* 77.

Van der Vyver JD 'Municipal legal obligations of states parties to the Convention on the Rights of the Child: The South African model' (2006) 20(1) *Emory International Law Review* 9.

Van Heerden B and Clarke B 'Parenthood in South African Law – Equality and independence? Recent developments in the law relating to guardianship' (1995) 112 *South African Law Journal* 140.

Van Heerden B and Sloth-Nielsen J 'Putting humpty dumpty together back again: Towards restructuring families and children's lives in South Africa' (1998) 115 *South African Law Journal* 156.

Van Oosten F '*Castell v De Greef* and the doctrine of informed consent: Medical paternalism ousted in favour of patient autonomy' (1995) 28(1) *De Jure* 164.

Van Oosten E 'The Choice on Termination of Pregnancy Act: Some comments' (1999) 116(1) *South African Law Journal* 60.

Wald MS 'Children's rights: A framework of analysis' (1979) 12(2) *University of California Davis Law Review* 255.

Wald M 'Making sense out of the rights of youth' (1974) 4 *Human Rights* 13.

Walsh B 'The United Nations Convention on the Rights of the Child: A British view' (1991) 5 *International Journal of Law and the Family* 170.

Washak RA 'Payoffs and pitfalls of listening to children' (2003) 52(4) *Family Relations* 373.

Weithorn LA and Campbell SB 'The competence of children and adolescents to make informed consent in treatment decisions' (1982) 53(6) *Child Development* 1589.

Wilson A 'The infancy of the history of childhood: An appraisal of Philippe Aries' (1980) 19 *History and Theory* 132.

Woodhouse BB 'From property to personhood: A child-centred perspective on parents' rights' (1997-1998) 5 *Georgetown Journal on Fighting Poverty* 313.

Woodhouse BB 'The constitutionalisation of children's rights: Incorporating emerging human rights into constitutional doctrine' (1999-2000) 2 *University of Pennsylvania Journal of Constitutional Law* 1.

Woodhead M 'Reconstructing developmental psychology – Some first steps' (1999) 13 *Children and society* 3.

Woodhouse BB 'The dark side of family privacy' (1999) 67 *George Washington Law Review* 1247.

Woolley S 'Children of Jehovah's Witnesses and adolescent Jehovah's Witnesses: What are their rights?' (2005) 90(7) *Archives of Diseases in Childhood* 715.

Zaal N and Skelton A 'Providing effective representation for children in a constitutional era: Lawyers in the criminal and the children's courts' (1998) 14 *South African Journal Human Rights* 539.

Zampas C and Gher JM 'Abortion as a human right: International and regional standards' (2008) 8(2) *Human Rights Law Review* 249.

Reports

Bessner R *The voice of the child in divorce, custody and access proceedings* (2002) Report commissioned by the Department of Justice, Canada.

UK Electoral Commission *Age of electoral majority: Report and recommendations* (2002).

Feinstein C, Laws S and Karkara R *An introductory workshop report on child participation in the UN study on violence against children* (2004) Save the Children, Sweden.

Frones I, Jensen AM and Solberg A *Childhood as a social phenomenon* (1990) National Report, Norway.

Landers C *Early child development summary report* (1989) UNICEF, New York.

Save the Children Sweden, *Regional study on child participation in Southern Africa* (2010) Save the Children, Sweden.

Save the Children Sweden, *Children's Poll South African Child Rights Survey: Summary report* (2002) Save the Children, Sweden.

Dissertations

A Boniface *Revolutionary changes to the parent-child relationship in South Africa, with specific reference to guardianship, care and contact*, Thesis submitted in partial fulfilment of the degree of Doctor Legum in the Faculty of Law, University of Pretoria (2007).

Chirwa D *Towards binding economic, social and cultural rights obligations of non-state actors: A critical survey of emerging norms*, A thesis submitted in full fulfilment of the requirements for the degree of Doctor Legum, University of the Western Cape (2005).

Du Preez WR *Medical Treatment of children and the Children's Act 38 of 2005*, Dissertation submitted in partial fulfilment of the requirements of the LLM degree at the University of Pretoria (2011).

Kassan D *How can the voice of the child be adequately heard in family law proceedings?* Unpublished LLM Dissertation, University of the Western Cape (2004).

Kruger JM *Judicial interference with parental authority: A comparative analysis of child protection measures*, A thesis submitted in terms of the requirements of the degree of Doctor Legum (2003).

Mushowe B *Legal representation of children in care and protection proceedings in South Africa: An evaluation of the best interests and client-based approaches* Thesis submitted in partial fulfilment of the requirements of a Masters Degree in Child Care and Protection, Faculty of Law, University of KwaZulu Natal (2008).

Van Oosten F *The doctrine of informed consent in medical law*, Unpublished doctoral thesis, University of South Africa (1989).

Monographs, occasional papers and essays

Alston P and Tobin J *Laying the foundations for children's rights: An independent study of some key legal and institutional aspects of the impact of the Convention on the Rights of the Child* (2005) United Nations Children's Fund, Florence, Italy.

Armstrong A *A child belongs to everyone: Law, family and the construction of the best interests in Zimbabwe* (1995) Innocenti Occasional Papers, Child Rights Series, Number 11, Florence, Italy.

Boyden J and Levison D *Children as economic and social actors in the development process* (2000) Working Paper No. 1, Expert Group on Development Issues, Stockholm.

Doek JE *Independent Human Rights Institutions for Children* (2008) Innocenti Working Paper 2008-06, Florence: Italy.

Feinstein C and O'Kane C 'Children's and adolescent's participation and protection from sexual abuse and exploitation' (2008) Innocenti Working Paper 2009-09, Florence, Italy.

Hart R *Children's participation: From tokenism to citizenship* (1992) Innocenti Essays, No. 4, Florence, Italy.

Heyns C *Where is the voice of Africa in our constitution* (1996) Occasional Paper No 8, Centre for Human Rights, University of Pretoria, Pretoria.

Kelly L *Understanding young people's right to decide: Why is it important to develop capacities for autonomous decision-making* (2012) International Planned Parenthood Federation.

Landsown G *Every child's right to be heard: A resource guide on the UN Committee on Right of the Child General Comment 12* (2011) Save the Children and UNICEF, London.

Lansdown G *Promoting children's participation in democratic decision-making* (2001) UNICEF, Florence: Italy.

Lansdown G *The evolving capacities of the child* (2005) UNICEF, Florence: Italy.

Sorens J 'Libertarian theory and children's rights: The fiduciary model, rationality, interests and the challenge of abortion' (2001) Philosophical Notes No 61, Libertarian Alliance.

Internet sources and newspaper materials

Bubesi S 'Boy threatened with death after investigation into circumcision camps: Children kidnapped and mutilated' *Sunday Times* (14 March 1999).

Carstens P 'Informed consent in South African medical law with reference to legislative development' available at <http://new.samls.co.za/node/410> (accessed 5 May 2014).

Gophe M 'Wife held after husband's forced circumcision' *The Cape Argus*. Independent Online News, South Africa. (2 April 2005).

Peters M 'Rastafarian circumcised against his will' IOL News (4 July 2004).

UNICEF Press Release, 'First Global Meeting of Independent Human Rights Institutions For Children', www.unicef.org/specialsession/activities/ihri-pr.htm (8 May 2002).